

OUTLINE HISTORY OF THE UNITED STATES

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(24,854)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 201.

NORMAN S. WEAR, IMPEADED *SUB. NOM.* THE WEAR
SAND COMPANY, AND F. D. FOWLER, PLAINTIFFS IN
ERROR,

vs.

THE STATE OF KANSAS *EX REL.* S. M. BREWSTER,
ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

No. 18985.

STATE OF KANSAS ex Rel., Plaintiff,
vs.

EARL AKERS, State Treasurer, et al., etc., Defendants

Be it remembered, that on the 5th day of August, 1913, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, a petition and application for an alternative writ of Mandamus, which petition and application was allowed and the alternative writs of mandamus were issued to the defendants herein and duly served:—which writs of mandamus were in the words and figures as follows, to-wit:—

2 In the Supreme Court of the State of Kansas.

No. 18985.

STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

vs.

EARL AKERS, as State Treasurer; W. E. DAVIS, as State Auditor, and F. J. Schwartz, Doing Business as the Schwartz Sand Company; The Stewart-Peck Sand Company, a Corporation; The Stewart-Peck Southwestern Sand Company, a Corporation; C. E. Brown, J. W. Barry, O. A. Bennett, Louis St. Louis, F. D. Fowler, F. M. Cline, Albert F. Brundige, Samuel Baggley, and W. B. Rhodes, a Partnership Doing Business as Baggley & Rhodes, Defendants.

Alternative Writ of Mandamus.

To each and all of the above-named defendants, Greeting:

Whereas there has been filed in the Supreme Court and presented to me, the undersigned, a justice of said Court, an application for an alternative writ of mandamus, in the language following:

3 In the Supreme Court of the State of Kansas.

No. —.

STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

vs.

EARL AKERS, as State Treasurer; W. E. DAVIS, as State Auditor, and
F. J. Schwartz, Doing Business as the Schwartz Sand Company;
The Stewart-Peck Sand Company, a Corporation; The Wear Sand
Company, a Corporation; The Stewart-Peck Southwestern Sand
Company, a Corporation; C. E. Brown, J. W. Barry, O. A. Bennett,
Louis St. Louis, F. D. Fowler, F. M. Cline, Albert E. Brundige,
Samuel Baggley, and W. B. Rhodes, a Partnership Doing Busi-
ness as Baggley & Rhodes, Defendants.

Application for Alternative Writ of Mandamus.

Comes now the State of Kansas, by John S. Dawson, its Attorney General, and complains of the defendants herein, and for its cause of action against said defendants says:

First. That the State of Kansas is one of the states of the American Federal Republic, the United States of America, and as such State is a sovereign commonwealth, admitted into the Union January 29th, 1861, on an equal footing with the thirteen original states which declared their independence as a nation July 4th, 1776 and adopted the Constitution in 1787 and began its formal career as a nation in 1789.

4 Second. That as a sovereign commonwealth, the State of Kansas, plaintiff herein, has sovereignty, ownership, dominion and control of the rivers, streams and waters within the said state, and of the lands underlying said rivers, streams and waters, except such rivers, streams and waters and the lands underlying and beneath the same as have been patented, granted or otherwise conveyed by the United States of America, or by this plaintiff.

Third. That the defendant Earl Akers is Treasurer of the State of Kansas, and the defendant W. E. Davis is Auditor of the state of Kansas, and the other defendants herein-above mentioned are persons, partnerships and corporations engaged in the taking of sand from the rivers, streams and waters of the state of Kansas and the lands, channels and beds underlying the same, which rivers, streams and waters and the lands, beds and channels underlying the same are under the sovereignty, ownership, dominion and control of the plaintiff.

Fourth. That in the rivers, streams and waters within the state of Kansas, over which the plaintiff has sovereignty, ownership, dominion and control, as aforesaid, and in the lands, beds and channels underlying such rivers, streams and waters, are large quantities of valuable materials and commodities, to-wit, sand, oil-gas, gravel, coal and many other natural products pertaining to said

rivers, streams and waters and the lands, beds and channels underneath the same, all of which belong to the plaintiff and are under plaintiff's sovereignty, ownership, dominion and control.

5 Fifth. That, by Chapter 259 of the Session Laws of Kansas of 1913, it became and was the duty of the Executive Council of the State of Kansas to fix prices and terms of payment under and by which any person, partnership or corporation might take from such rivers, streams and waters of the plaintiff and the lands, beds and channels underneath the same; and pursuant to the powers conferred by said act and in compliance with their duty thereunder, the Executive Council of the State of Kansas has fixed prices, terms and conditions under which such articles and commodities may be taken from such rivers, streams and waters and from lands underlying the same, which terms and conditions briefly are, that all persons, partnerships and corporations taking sand from such rivers, streams and waters and the beds underlying the same, belonging to the plaintiff, shall pay to the State of Kansas, ten per cent of the market value of such sand upon the river bank, and that the payments therefor shall be remitted monthly to the defendant Earl Akers, State Treasurer; and by the terms of said act said defendant Treasurer should from time to time turn over the moneys so received by him to the general revenue fund of the State and account therefor to the defendant W. E. Davis Auditor of the State of Kansas, which latter officer should charge said State Treasurer with the moneys so received and hold the said State Treasurer accountable therefor to the credit of the general revenue fund of the State.

Sixth. That for many years prior to the taking effect of said Chapter 259 of the Session Laws of 1913, the business of taking sand from the rivers, streams and waters of the State of Kansas and the lands, channels and beds underlying the same was extensively carried on in various portions of the state of Kansas
6 by the above-named defendants and various other persons, partnerships and corporations unknown to plaintiff at this time; and when said act took effect and the first payments of royalties became due for sand taken from the plaintiff's rivers, streams and waters and the lands, channels and beds underlying the same, the above-named defendants paid certain moneys to the defendant State Treasurer under protest, which payments received during the month of June, 1913 for the sand taken by the said defendants were the following amounts:

C. E. Brown, Hutchinson, Kansas.....	\$12.32
Schwartz Sand Company, Wichita, Kansas.....	64.15
J. W. Barry, Lawrence, Kansas.....	15.13
O. A. Bennett, Concordia, Kansas.....	1.00
Louis St. Louis, " ".....	1.45
Baggley & Rhodes, Dodge City, Kansas.....	8.40
Stewart-Peck Sand Company, Kansas City, Mo.....	2,663.97
F. D. Fowler, Topeka, Kansas.....	49.91
Wear Sand Company, Topeka, Kansas.....	193.83
Stewart-Peck Southwestern Sand Co., Topeka.....	190.07;

And the amounts paid by defendants, likewise under protest, during the month of July, 1913 for sand taken from the rivers, streams and waters and the lands, beds and channels underlying the same, belonging to the plaintiff, were as follows:

Baggley & Rhodes, Dodge City, Kansas.....	\$11.22
F. M. Cline, Hutchinson, Kansas.....	.80
Albert F. Brundige, Hutchinson, Kansas.....	.40
Stewart-Peck Sand Co., Kansas City, Mo.....	2,309.74
J. W. Barry, Lawrence, Kansas.....	12.08
C. E. Brown, Hutchinson, Kansas.....	5.64
F. D. Fowler, Topeka, Kansas.....	30.69;

and plaintiff is unable to state the grounds upon which the above-named persons, partnerships and corporations engaged in the sand business paid under protest but plaintiff believes that such
 7 protests were made by said defendants on account of certain pretended defects and constitutional infirmities inherent in said Chapter 259 of the Session Laws of Kansas of 1913.

Seventh. Plaintiff further alleges that by reason of said protests accompanying the aforesaid payments, the Executive Council of the State of Kansas instructed the State Treasurer to take charge of such moneys and payments for sand as "Custodian" and keep said moneys in a separate account, to be known as the "River Fund," and instructed the State Auditor to keep a similar account and charge the defendant Earl Akers, State Treasurer, as custodian of said "River Fund" for the moneys thus received, and the defendant Earl Akers, State Treasurer, and the defendant W. E. Davis, State Auditor, have hitherto kept and maintained such moneys and accounts and records thereof as a special account; and plaintiff alleges that it was the duty of the State Treasurer from time to time to transfer and deposit the net proceeds of all sales of sand as aforesaid to the general revenue fund of the State, to be used with other moneys in that fund for paying the general expenses of state government as prescribed and appropriated by the legislature, and it became and was and has continued to be the duty of the State Auditor, W. E. Davis, to charge the State Treasurer with the net proceeds of moneys paid for sand as a part of the general revenue fund of the State, but on account of the protests of the other defendants hereinabove mentioned, and the instructions and directions of the Executive Council, the said defendant, Earl Akers, State Treasurer, still keeps all of the moneys paid by the defendants for sand in a separate fund, and the State Auditor likewise coerced by the protests of the other defendants erroneously
 8 recognizes the right of the State Treasurer so to do, and the State Auditor, for the time being, excuses the State Treasurer for maintaining said moneys as a separate fund not included in the general revenue fund of the State.

Eighth. Plaintiff says that in the maintenance of its government and all the many and wide activities of its sovereign power engaged in the administration of justice, the education of the young, the care of the defective, misfortunate and criminal, it needs to be constantly

drawing vast sums from the general revenue fund of the State, and the funds derived from the sale of sand, under the provisions of Chapter 259 aforesaid of the Session Laws of 1913 are depended upon by the plaintiff as one of its sources of general revenue for the payment of its governmental expenditures. Plaintiff has no adequate remedy at law against the defendants herein except by writ of mandamus issued by this Honorable Court, commanding the said Earl Akers, as State Treasurer, from time to time to transfer all the net proceeds of the sales of sand as aforesaid, paid in by the defendants and others similarly situated and engaged in similar business, to the general revenue fund of the State, and commanding and directing the defendant W. E. Davis, State Auditor, to manage his records and accounts in conformity therewith, and to give the State Treasurer credit from time to time for the net proceeds of moneys derived from the sale of sand and transferred from the said "River Fund" to the general revenue fund, and to charge the State Treasurer and hold said State Treasurer to account for said moneys as part of the general revenue fund of the State.

9 Ninth. Plaintiff refers to all the above and foregoing as part hereof and says that all the persons, partnerships and corporations above-mentioned claim to have an interest in the several items of money paid by them to the State Treasurer as herein-above set forth, and contend that on account of their several protests, such moneys should not be transferred to the general revenue fund of the State, but plaintiff is not advised of the exact nature of their claims nor of the foundation of their several protests, and plaintiff brings them into court as necessary and proper parties to this proceeding that they may be advised thereof and plead their interest and be governed by the decision in this case.

Tenth. And plaintiff alleges that neither the State Treasurer nor the State Auditor have sufficient lawful justification or excuse for further holding said moneys in any separate fund or longer withholding said moneys from the general revenue fund of the State, nor do the several protests of the several defendants as aforesaid avail aught against this plaintiff, and plaintiff is entitled to a writ of mandamus commanding and directing the Auditor and Treasurer to transfer all the aforesaid moneys to the general revenue fund and regulate their accounts and bookkeeping in accordance therewith, and plaintiff is entitled to judgment against the other defendants above-mentioned that their several protests, claims and objections are not sufficient in law to withhold the relief claimed by plaintiff.

10 Wherefore, plaintiff prays that a writ of mandamus issue commanding and directing Earl Akers, State Treasurer, to transfer the aforesaid moneys now in his hands as Custodian of the "River Fund," to the general revenue fund of the State, and commanding and directing the State Auditor, W. E. Davis, to charge the said State Treasurer's general revenue account therewith and to give said State Treasurer credit on the "River Fund" for the moneys thus transferred, and for a decree of judgment against the other defendants, barring them and each of them, from any and all

claim, right or interest whatsoever in the moneys aforesaid heretofore paid in by them, and for such further relief as to this Honorable Court shall seem just, lawful and proper.

JOHN S. DAWSON,
Attorney General.

11 Now, therefore, it being agreeable to us that speedy justice should be done, these presents are to command you, the said Earl Akers, State Treasurer, to transfer to the General Revenue Fund of the State of Kansas all moneys now held by you as custodian of the "River Fund," and to command you, the said W. E. Davis, State Auditor, to manage and regulate your accounts so as to charge the said State Treasurer with the said moneys as part of the General Revenue Fund of the State of Kansas and to give the said State Treasurer credit on the "River Fund" for all moneys so transferred; or that you and each of you, the said State Treasurer and State Auditor, answer herein and show on or before the 25th day of August, 1913, why you have not so done; and each and all of the other defendants herein above named, to-wit:

F. J. Schwartz, doing business as the Schwartz Sand Company; The Stewart-Peck Sand Company, a corporation; The Stewart-Peck Southwestern Sand Company, a corporation; The Wear Sand Company, a corporation; C. E. Brown; J. W. Barry; O. A. Bennett; Louis St. Louis; F. D. Fowler; F. M. Cline; Albert F. Brundige; Samuel Baggley and W. B. Rhodes, a partnership doing business as Baggley & Rhodes, may likewise answer herein on or before said date, the 25th day of August, 1913, showing what legal ground, if any you have, why the moneys you have severally paid to the State Treasurer "under protest" should not be transferred to the General Revenue Fund of the State and a peremptory writ of mandamus issue to that effect.

Dated at the State Capital in the City of Topeka, Kansas, this 5th day of August, 1913.

HENRY F. MASON, *Justice.*

12 And afterwards, to-wit, on the 25th day of August, 1913, there was filed in the office of the clerk of the supreme court of the state of Kansas, the separate answer of the defendant the Wear Sand Company, which separate answer together with the indorsements thereon is in the words and figures as follows:—

In the Supreme Court of the State of Kansas.

No. 18985.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

v.

EARL AKERS, as State Treasurer; W. E. DAVIS, as State Auditor, and F. J. Schwartz, Doing Business as the Schwartz Sand Company; The Stewart-Peck Sand Company, a Corporation; The Stewart-Peck Southwestern Sand Company, a Corporation; C. E. Brown, J. W. Barry, O. A. Bennett, Louis St. Louis, F. D. Fowler, F. M. Cline, Albert F. Brundige, Samuel Baggley, and W. B. Rhodes, a Partnership Doing Business as Baggley & Rhodes; The Wear Sand Company, a Corporation, Defendants.

Separate Answer of Wear Sand Company.

Comes now Wear Sand Company, one of the defendants above named and answering for itself alone the application of plaintiff in this cause filed, and as reason why the writ of Mandamus should not issue herein, respectfully answering, shows the Court:

Defendant admits that the State of Kansas is one of the States of the United States of America and has been such since January 29th, 1861; That the defendant Earl Akers is Treasurer and W. E. Davis is Auditor of the said State and that this defendant is engaged in the business of dredging and vending sand from the Kansas River, in the State of Kansas, and from other rivers and streams situate outside of said State: That this defendant paid the sum of money specified in plaintiff's application herein filed to said Treasurer and paid the same under protest and claim- an interest in said sums of money so paid.

Defendant has no means of knowledge as to, and is not informed whether the Executive Council of the State of Kansas instructed the State Treasurer to take charge of the moneys paid in by this defendant, "as custodian" and keep said moneys in separate account, to be known as the "River Fund" and instructed the State Auditor to keep a similar account and charge the defendant Earl Akers, State Treasurer, as custodian thereof, and is not informed and has no

14 means of knowledge as to whether said Treasurer and Auditor so did, and defendant prays that plaintiff be required to offer due proof of said allegations insofar as the same may be material in this proceeding, but defendant admits that it claims that said sums should not be paid into the general fund of the State of Kansas, and for the reason that this defendant alleges that defendant and not the State of Kansas is the owner of the funds by it so paid to Earl Akers as by plaintiff alleged, and is entitled to the possession of said moneys.

And defendant states that the admissions herein contained are not sufficient to entitle the plaintiff to the writ of Mandamus as

prayed by said plaintiff, and that such writ should not issue in behalf of plaintiff for the following reasons:

First.

That all of the allegations in plaintiff's application contained, except as herein admitted, or proof of which is prayed by this defendant, are untrue in fact.

Second.

That prior to the 29th day of January, A. D. 1861, and while the now State of Kansas was an organized Territory of the United States, on, to-wit, the — day of February, A. D. 1859, there was enacted and approved and thereafter duly published a certain act of the Territorial Legislature of Kansas Territory entitled "An Act Adopting the Common Law as the Rule of Action in This Territory and Regulating the Authentication of Statutes and the Taking Effect Thereof," of which said Act, Section one is in words and figures following, to-wit:

"The Common Law of England and all Statutes, and Acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States and the Act entitled 'An Act to organize the Territory of Nebraska and Kansas,' or any Statute law which may, from time to time, be made or passed by this or any subsequent Legislative Assembly of the Territory of Kansas, shall be the rule of action and decision in this Territory, any law, custom or usage to the contrary notwithstanding."

That on the first day of October, A. D. 1860, and while said statute still was in force in and the law of said Kansas Territory, the United States of America, by its certain Patent in writing, of that date, gave and granted unto George Gardner, all of Lot Number Five (5) in Section Thirty (30), Township Eleven (11), Range Sixteen (16), in the district of Lands, subject to sale at Lecompton, Kansas Territory, containing 12.20 acres, which said Lot No. 5 in Section 30 adjoined and was bounded by the Kansas River, and is located in what is now the County of Shawnee in the State of Kansas.

That said Act of the Territorial Legislature of the State of Kansas continued in force until the 29th day of January A. D., 1861, on which date said Kansas Territory was admitted to the Union of the United States of America, as the State of Kansas and thereafter said Act continued to be the law of the State of Kansas until the year 1868, when the said Statute was modified in its terms, in which modified form, the same has continued to be the law of the State of Kansas to this date and appears as Section 9850 of the General Statutes of Kansas, 1909, reference to which is hereby made.

That the Common Law of England governing the title and ownership of lands adjoining to streams and rivers and governing the title to and ownership of the beds of streams in which the tide

does not ebb and flow, became a rule of property by its adoption as the law of the State of Kansas, and to this day remains a rule of property in said State: That no Statute of the State of Kansas has been at any time since the admission of said State into the Union or prior thereto, enacted, modifying the Common Law rule of ownership of the beds of non tidal streams, until the alleged act published as Chapter 259 of the Session Laws of Kansas, A. D. 1913, being the Act relied upon and pleaded by the plaintiff in this proceeding.

That during and at all times prior to the fourth year of the reign of James the First the said Common Law of England, and not local to that kingdom, governing the title to the beds of non-tidal rivers, to-wit: rivers and streams in which the tides do not ebb and flow, vested the ownership of the beds of such streams in the owners of the adjoining uplands, and such law is not and never has been inconsistent with or repugnant to that certain Act of the

16 Congress of the United States of America entitled "An Act to organize the Territory of Nebraska and Kansas," or with or to any act of the Territorial Legislature of Kansas or with or to any valid enactment of the Legislature of the State of Kansas. That the Kansas River is and at all times has been a non-tidal stream, in which the tide does not ebb and flow and that by reason of the premises, and under the provisions of said law, the said George Gardner became the owner of and was vested with the absolute title to all that part of the bed of the Kansas River adjoining said Lot 5 in Section 30 to the centre of the stream and between the end lines of his said Lot No. 5 in Section 30 extended to the centre of said stream, together with all rights, interests and privileges thereunto appertaining.

That the title of said Gardner descended through various mesne conveyances to this defendant and defendant became the owner and is now the owner and in possession of all that part of Lot No. 5, Section 30 aforesaid, described as follows, to-wit:

"Beginning at a point on Lot 5 where the West line of Van Buren Street produced northerly across said Lot 5 intersects the Kansas River, thence Westerly up the Kansas River along the North line of Lot 5, one hundred and sixty-five (165) feet; thence southerly across said Lot 5 parallel with the west line of Van Buren Street produced, 275 feet, to the south line of said Lot 5; thence Easterly along the south line of said Lot 5, being the division line between the city Park and H. C. Root's property, 165 feet to the west line of Van Buren Street produced, to the place of beginning;

And that said described tract of land adjoins the Kansas River and has said River for its Northern boundary, and defendant is the owner of that portion of the bed of said river adjoining his said described real property in the same title in which the same was held and owned by said George Gardner, without any diminution of right or exception whatsoever, and has been such owner and has held possession of said river bed and of said other real estate undisturbed, openly and notoriously and without question of its right so to do for many years prior to the publication of said Chapter 259

of the Session Laws of Kansas 1913, and that the several successors in title of and intermediate said George Gardner and this
17 defendant, in like manner held title to and possession of said Lot Five and the bed of the said Kansas River adjoining said Lot 5, throughout the years from October A. D. 1860 to the entry of this defendant into possession, openly, notoriously, exclusively and under claim of ownership through and under and title deduced from said patent.

Defendant states that it has at all times controverted and denied and still controverts and denies the right of plaintiff to interfere in any manner, and especially under the pretended authority of Chapter 259 of the Session Laws of Kansas, A. D. 1913, with defendant's business and the carrying on thereof, of dredging sand from the Kansas River and defendant admits that it has dredged sand from said River, but alleges that its operations at all times have been carried on in front of and adjoining its land above described and between the bank of said river and the centre of the stream, and not otherwise and that it was the absolute owner of all sand dredged therefrom: Defendant states that it has at all times denied and still denies the claimed ownership of plaintiff in the bed of said Kansas River insofar as said River adjoins the said real property of this defendant; but notwithstanding the premises the plaintiff herein threatened that unless this defendant made the payments demanded by plaintiff and complied with the rules and regulations adopted by the Executive Council pursuant to the provisions of said Chapter 259 of the Session Laws of 1913 of the State of Kansas; that plaintiff would seek the aid of the courts and would enjoin this defendant from pursuing its said business of dredging and vending sand from said Kansas River where it has at all times carried on its said business; that said plaintiff actually did commence proceedings for such purpose against this defendant's co-defendant, Stewart-Peck Sand Company, which proceedings still are pending and undisposed of in the District Court of Wyandotte County, Kansas.

Defendant states that inasmuch as the State of Kansas was and is the opposing claimant to the theretofore undisputed title, claims and claimed rights of this defendant, by reason of which defendant was and is without access to the courts of the State, or of the
18 United States, to protect its rights and interests, except at the pleasure of said plaintiff, and, as the threatened interference by plaintiff, with defendant's business would and did cause heavy loss and irreparable injury to defendant, this defendant, in order to protect itself from such loss and injury did pay, under protest, the several sums of money specified in plaintiff's application herein for the Alternative writ of Mandamus.

Defendant states and alleges the fact to be that said Chapter 259 of the Session Laws of Kansas, 1913, is inapplicable to this defendant, the premises considered, inasmuch as this defendant is the owner of that portion of the bed of the said Kansas River over and upon which its operations were at all times conducted subsequent to the publication *were at all times conducted subsequent to*

the publication of said Chapter 259, and this defendant respectfully shows that should the provisions of said law be enforced against defendant, such enforcement would be contrary to the constitutional rights, privileges and immunities of defendant, in that defendant thereby would be deprived of its property without due process of law; would be deprived of the equal protection of the law and of the protection of equal laws and the property of defendant would be taken for public use without compensation to this defendant, all contrary — provisions of the constitution of the State of Kansas and of the constitution of the United States, in that behalf made and provided.

Third.

Defendant alleges that George H. Hodges is the duly elected qualified and acting Governor of the State of Kansas; that Charles H. Sessions is the duly elected, qualified and acting Secretary of State of the said State of Kansas; that W. E. Davis is the duly elected, qualified and acting State Auditor of said State; that Earl Akers is the duly elected, qualified and acting State Treasurer of said State; that W. D. Ross is the duly elected, qualified and acting Superintendent of Public Instruction in said State; and John S. Dawson is the duly elected, qualified and acting Attorney General of said State, and that they, in their official capacity, form, under the provisions of Article 9, Chapter III of the General Statutes of Kansas, 1909, a ministerial body, under the style or title of "The Executive Council," and, when duly convened in conformity to the requirements of the Statute, and acting pursuant to power conferred upon it by a valid enactment of the legislature of the State, the action of said Executive Council is binding upon the State of Kansas and upon the citizens of said State.

That to said Executive Council, as a part of the duties imposed upon it by the Statute is confided the charge, care and management of all property of the State where no other provision is made by law.

That the only provisions made by the Statutes of the State of Kansas in, about and concerning the care, custody, protection and control of the navigable rivers and waters of the State and the beds and banks thereof and of the islands in such rivers and waters, are the provisions in this court hereinafter stated.

That the Kaw, or Kansas River, was, at the time of the making of surveys by the United States, of the public lands of the United States within the boundaries of the now state of Kansas, meandered on both sides thereof to the full distance up said river covered by the hereinbefore specified operations of the complainants.

That the Kaw, or Kansas, river lies wholly within the State of Kansas but flows directly, and without intervening obstruction, into the Missouri River, which latter stream, from the North line of the State of Kansas to its mouth, in the State of Missouri, is a navigable stream. That the Missouri river flows directly into the Mississippi river, which latter, both above the said point of junction with the Missouri River and below thence to its mouth, is a navigable stream; that the Mississippi Rivers flows directly into and connects directly

with the navigable waters of the high seas at the Gulf of Mexico, and that said Mississippi and Missouri Rivers, together with the said Kansas or Kaw river to the up stream extremity of the said meander lines now form, and at all times hereinafter mentioned have formed, one continuous, open and unobstructed public water-way of the

20 United States between and from said up stream extremity of the meander lines of said Kansas river to and with the navigable waters of the high seas at and through said the Gulf of Mexico.

That by statute duly enacted by the Legislature of the State of Kansas and thereafter, in due course, becoming a law of the State of Kansas and published as Chapter 97 of the Session Laws of Kansas, 1864, the said Kansas river was declared to be a non-navigable stream and that no repeal of such act has at any time since its enactment been attempted until the year 1913, as hereinafter recited.

That surperimposed upon and flowing over and upon the bed of and mixed and moving with the waters in and of said Kansas River is a mass of disintegrated rock particles ordinarily designated and known as "Sand" and "Gravel", according to the size of the constituent particles thereof, which sand and gravel are not and never have been the bed of said stream nor the product of the disintegration, by erosion or otherwise, of any stratum or strata of the bed or banks of said Kansas river or of any lands at or adjoining said stream, from the mouth thereof up stream to the head of the meander lines of said stream as fixed by the public survey; that said sand and gravel are not a natural product of said stream at any point between its said mouth and the head of the said meander lines but are the product of and flow into the said stream from and out of and mixed with the waters of its tributary streams from its head-waters to its mouth, in the banks or bed of which tributary streams the state of Kansas has not now and never had any property right or proprietary interest whatsoever.

That the sand and gravel in said Kansas River never have been and are not now fixed or immovable and never have formed and do not now form any regular, stable and fixed and immovable stratum or strata, but on the contrary, said sands and gravel at all times within and beyond the memory of man have been and yet are shifting, unfixed, migratory, elusive and fugitive in their nature, mixed and moving with the waters of the river in the direction of and with the flow of such waters and varying in speed, volume and progress with the rate of flow of the water in said stream; that such motion is

21 not due to or of the character of natural erosion or disintegration of fixed land or strata, but results from a natural inherent law of the substance, a motion ever shifting, flowing and moving onwards and forward with the waters of said stream, rendering such sand and gravel fugitive beyond confinement and partaking more of the elusive and unstable character of the waters of said stream than of the strata of the land of its fixed bed and banks.

That such sand, in its natural condition of location, is not of commercial value but is commercially useless until mechanically sepa-

rated from and drained of its accompanying waters and removed from said stream. That the presence of such sand in the bed of said stream and mingled with its waters is, in fact, detrimental to the utilization of said stream for the great purposes for which, but for the presence of said sand, the said stream could and would be utilized in the service of the people and the upbuilding of the commerce of the State of Kansas, to-wit: For the purposes of navigation and as a valuable commercial highway. That in fact said sand and gravel located upon and in and flowing over the bed of said stream in the unlimited quantity in which it exists constitutes a common nuisance by its accumulations, destroying navigation, filling up the natural water course, impeding the passage of the water and, in time of high water, causing flood waters to overflow the river banks and spread out over the adjoining arable lands to the great injury and frequently to the destruction of the latter, said sand and gravel accompanying said waters in their overflow and causing and forming injurious and destructive deposits upon and frequently irreparable injury to adjacent riparian lands.

That such sand and gravel can, under certain conditions, be turned into an article of utility and commerce and from time immemorial the people of the territory now within the boundary lines of the state of Kansas and the persons within said State since its organization and admission into the Union have, unquestioned, and by and under claim of common right, taken and exercised the right to take sand and gravel from the public waters and from the meandered streams within said territory, including said Kansas River;

22 that such right has never been questioned in the State of

Kansas until the present time and is common to every community of people, civilized or otherwise and is universally allowed, admitted and unrestrained: That said Kansas River ever has been and now is claimed and admitted to be a public stream and public highway, the right to the use of which stream, its waters and products, including the sand and gravel therein, and to take sand and gravel therefrom without let or hindrance is, and always has been vested in the people within said State and by common right allowed to be so vested, subject only to such reasonable rules governing the exercise of such right and for the protection of the common right as the State might, in the exercise of its police supervision, lawfully adopt, and to the right and control for the purposes of navigation vested in the United States by the Constitution and laws of the United States.

Defendant further respectfully represents and shows that under and by virtue of the provisions of Section 3 of Chapter 119 of the general statutes of Kansas, 1868, the Common Law of England which theretofore had been the law of the Territory of Kansas and of the State of Kansas after the admission of said State into the Union (Except as modified by said Statute), was continued in force in said State in aid of the constitution, statute law, judicial decisions and the conditions and wants of the people of the State but as modified thereby and that the said common law of England except as modified in the manner aforesaid, remains in full force and effect in said

state; that at no time since or prior to the admission of the State of Kansas into the Union have the provisions of the said common law governing the rights of the individual citizens and the people within the State of Kansas in the public waters and navigable streams of the state been modified, abrogated, diminished or in any manner changed either by constitutional or statutory law, or by the wants and conditions of the people, or by judicial decisions of the courts either of the Territory or of the State of Kansas, except as to the attempted change thereof hereinafter recited: That the rights, interests, privileges and immunities of the people within the State and

23 of the State of Kansas, at the common law, in, to, about and concerning the public waters and navigable streams within said state, so far as determined by judicial decisions within the state, — been affirmed and confirmed absolutely as under the common law. That under and by virtue of said common law, the use of the public waters and streams and the products thereof and the sands and gravel flowing over the bed thereof was a common right vested in the people and in each person of the community, of which right no person might, by any power or claim of authority be deprived; and the title to said waters and streams, the products thereof, and said sand and gravel and of the banks and shores of such waters, where not otherwise vested, was and is vested in the State in trust for the common benefit of all of the people and of each person of the community and every person within said state; and such title is not an estate in fee and never has been otherwise held or enjoyed by the State of Kansas than as such trust estate; and each individual person within said State including defendant, is entitled to reduce to possession and ownership a fair share of the waters of said streams and the products thereof and of the sand and gravel aforesaid which right is the property right of which the defendant may not be deprived except for public purposes and upon compensation.

That the sole claim of right made by said Executive Council to exercise authority over said Kansas River or any other of the waters of the State of Kansas, is based upon and is alleged to arise out of Chapter 259 of the Session Laws of Kansas, A. D., 1913 and that under pretense of power conferred by said alleged statute upon said Council and for the purpose of obtaining money and other property of and from this defendant, said members of said Council procured the Attorney General of the State of Kansas to institute an action against this defendant's co-defendant, Stewart-Peck Sand Company, in the District Court of Wyandotte County, Kansas, for the purpose of enjoining said defendant from exercising its undoubted right to dredge sand from said the Kansas River, unless upon condition that said defendant pay to said Earl Akers, State Treasurer, large sums of money to be determined according to certain alleged rules,

24 represented to have been adopted by said council under authority of said pretended act of the Legislature published as Chapter 259 of the Session Laws of Kansas, A. D., 1913: That said Attorney General did institute a suit of that character against this defendant's Co-defendant Stewart-Peck Sand Company in the District Court of the said county of Wyandotte and such suit is pending

therein and undetermined at this time, and procured said Attorney General to threaten to commence and prosecute a similar suit against this defendant and to threaten to prosecute criminally the employes of this defendant and to enjoin this defendant from prosecuting its said business unless and until this defendant should, in like manner, pay to the said Akers as State Treasurer, the sums of money demanded of this defendant and should comply with the rules alleged to have been adopted by said Executive Council as above specified, all of which this defendant believed said Attorney General would proceed to do.

Defendant states that in order to avoid the great and irreparable damage which would result to its business from the suspension of its operations in the dredging of sand then being carried on, and in order to protect its property and property rights from confiscation and destruction under proceedings in the courts of the State of Kansas which said members of said council threatened to institute against this defendant and in order to protect the agents, representatives and employes of defendant from arrest and imprisonment under prosecutions in the courts of the State, which said members of the council threatened to begin and have prosecuted, this defendant, under protest, and at all times denying the validity of said Chapter 259, and at all times denying the right, power and authority of the members of said Council to make rules and regulations concerning and fixing a price at which the sand and gravel in said rivers should be sold, did comply with said alleged rules and regulations and did pay over to said members of said Executive Council, through its agents appointed to receive the same, the moneys specified in plaintiff's application herein. That such payments were not voluntarily made but were made solely to protect the property rights of defendant from wrongful invasion, injury and destruction by the officers representing the State of Kansas, under color and cloak of their official authority.

Defendant avers, that said Chapter 259 of the said Session Laws of 1913, constitutes no authority to said Executive Council, or the members thereof, to require compliance on the part of this defendant with the terms and provisions of said chapter, for that if the provisions of said Chapter be held to apply to this defendant, defendant would thereby be deprived of its property and property rights without due process of law; that the property of this defendant would be taken for public purposes without compensation and this defendant would be deprived of the equal protection of the laws and of the protection of equal laws contrary to the provisions of the Constitution of the United States and of the constitution of the State of Kansas in that behalf made and provided.

Fourth.

Defendant states, that on or about the 10th day of May, A. D., 1913, The State of Kansas, through and by its Attorney General filed in the District Court of Wyandotte County, Kansas, its certain petition against this defendant's co-defendant, Stewart-Pech Sand Company, whereby and by the terms of which said State claimed owner-

ship in title absolute to the Kansas River between its banks and from bank to bank to the head of the meander lines upon the banks thereof; alleges that said defendant took and converted certain sand and gravel from the bed of said stream; that said plaintiff is entitled to be paid for the sand and gravel so alleged to have been taken by said defendant, and praying judgment against said defendant for the alleged value of the sand and gravel alleged to have been so taken.

That thereafter, and on or about the 17th day of May, A. D., 1913, Charles S. Sessions, Secretary of State of the State of Kansas transmitted through the United States Mails, a certified copy of summons to him directed for service upon said defendant, which certified copy of summons was received by said defendant in due course, through said mails. That said action is still pending and un-

26 determined in said court, and such suit is of a nature that every issue of fact herein by said — and by this defendant pleaded may properly be pleaded, determined and decided in due and orderly course of procedure and every issue of law and fact upon the determination of which rests the right of the State of Kansas to have the said "River Fund" turned into its general fund can be and of right ought to be tried, determined and decided in said cause pending in Wyandotte County. That the determination of the issues in said action of necessity must determine the right of the State to said River fund and, upon the decision in said cause to be rendered must be and will be predicated the right of the State of Kansas to have its said Treasurer and Auditor perform the acts by this Application required of them as an unquestioned duty, and whether the performance of said acts by said officers is due to the State of Kansas as an unquestioned duty cannot be determined until the many questions of fact upon which the ownership of said River Fund depends shall have been decided, and that the questions of law and fact which should necessarily be decided in that cause must and will govern in the decision of like conflicting claims of plaintiff and this defendant.

Defendant respectfully represents that this proceeding is a proceeding of extraordinary nature, not designed for the trial and disposition of questions affecting the right to property between contending claimants: That defendant has a right under the provisions of the Constitution of the State of Kansas, of which defendant may not lawfully be deprived, to a hearing before a competent tribunal in the due and ordinary course of law: That this court is without jurisdiction to entertain and determine, in the first instance, questions of right to property. That were this court to entertain jurisdiction of and determine the many questions of fact necessary to be considered and decided in this proceeding before the relief sought by plaintiff could be granted, this defendant would be deprived of the equal protection of the laws and of the protection of equal laws, contrary to the provisions of the Constitution of the United States, and the Constitution of the State of Kansas in that behalf made and provided.

Fifth.

Defendant refers to the fifth and sixth counts or subdivisions of the answer of its co-defendant, Stewart-Peck Sand Company and adopts said counts and incorporates the same herein as fully and completely as though such counts were herein set forth in *hæc verba* and prays advantage of the said counts and the recitals thereof.

Defendant states that if said funds be paid into the State Treasury of the State of Kansas and into the General Fund thereof for the use of said State, defendant will be without remedy in the courts of this State or of the United States to compel restitution thereof by the State, if the claims of this defendant be sustained upon hearing in a court of competent jurisdiction; that, the premises considered, it is apparent that there exists in this cause no such clear and undoubted legal right of plaintiff to the relief sought in this proceeding, as will compel or authorize the discretionary order prayed for; that plaintiff is not entitled, as of right, to have said moneys paid into the General Fund, nor will plaintiff be so entitled until the conflicting rights of said plaintiff and this defendant shall have been heard and decided in due course of orderly procedure, by a court of competent jurisdiction; on consideration of all of which defendant respectfully avers that this court is without original jurisdiction to determine the respective claims of the parties hereto, involving the property rights of this defendant, that plaintiff should be remitted for its remedy, if any it has, to the courts of the State having authority to hear and determine the facts in cases of conflicting claims to property, and that defendant should be dismissed hence without day.

FRANCIS C. DOWNEY,

Attorneys for Defendant Wear Sand Company.

Endorsed: No. 18985. Original. The State of Kansas ex Rel. John S. Dawson, Att'y Gen., Plaintiff, vs. Earl Akers, State Treasurer, et al., Defendants. Separate Answer of The Wear Sand Co. Francis C. Downey, Att'y for Answering Def't. Filed Aug. 25, 1913. D. A. Valentine, Clerk Supreme Court.

27½ Be it further remembered, that afterwards on the 3rd day of September, A. D. 1913, there was filed in the office of the clerk of the supreme court of the state of Kansas, the Separate Answer of the defendant F. D. Fowler, and the amended answer of the Stewart-Peck Sand Company, which answer and amended answer together with the indorsements thereon are in the words and figures as follows, to-wit:

No. 18985.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

vs.

EARL AKERS, as State Treasurer; W. E. DAVIS, as State Auditor, and
F. J. Schwartz, Doing Business as the Schwartz Sand Company;
The Stewart-Peck Sand Company, a Corporation; The Stewart-
Peck Southwestern Sand Company, a Corporation; C. E. Brown,
J. W. Barry, O. A. Bennett, Louis St. Louis, F. D. Fowler, F. N.
Cline, Albert F. Brundige, Samuel Bagglely, and W. B. Rhodes,
a Partnership Doing Business as Bagley & Rhodes; The Wear Sand
Company, a Corporation, Defendants.

Separate Answer of F. D. Fowler.

Comes now F. D. Fowler, one of the defendants above named and answering for himself alone the application of plaintiff in this cause filed, and as reason why the Writ of Mandamus should not issue herein, respectfully answering, shows the Court:

Defendant admits that the State of Kansas is one of the States of the United States of America and has been such since January 29th, 1861; That the defendant Earl Akers is Treasurer and W. E. Davis is Auditor of the said State and that this defendant is engaged in the business of dredging and vending sand from the Kansas River, in the State of Kansas; That this defendant paid the sum of money specified in plaintiff's application herein filed to said Treasurer and paid the same under protest and that he claims an interest in said sums of money so paid.

Defendant has no means of knowledge as to, and is not informed whether the Executive Council of the State of Kansas instructed the State Treasurer to take charge of the moneys paid in by this defendant, "as custodian" and keep said moneys in separate account, to be known as the "River Fund" and instructed the State Auditor to keep a similar account and charge the defendant Earl Akers, State

29 Treasurer, as custodian thereof, and is not informed and has no means of knowledge as to whether said Treasurer and Auditor so did, and defendant prays that plaintiff be required to offer due proof of said allegations insofar as the same may be material in this proceeding, but defendant admits that it claims that said sums should not be paid into the general fund of the State of Kansas, and for the reason that this defendant alleges that defendant and not the State of Kansas is the owner of the funds by it so paid to Earl Akers as by plaintiff alleged, and is entitled to the possession of said moneys.

And defendant states that the admissions herein contained are not sufficient to entitle the plaintiff to the Writ of Mandamus as

prayed by said plaintiff, and that such writ should not issue in behalf of plaintiff for the following reasons:

First.

That all of the allegations in plaintiff's application contained, except as herein admitted, or proof of which is prayed by this defendant, are untrue in fact.

Second.

That prior to the 29th day of January, A. D. 1861 and while the now State of Kansas was an organized Territory of the United States, on, to-wit, the — day of February, A. D. 1859, there was enacted and approved, and thereafter duly published, a certain Act of the Territorial Legislature of Kansas Territory entitled "An Act adopting the Common Law as the Rule of Action in This Territory and Regulating the Authentication of Statutes and the Taking Effect Thereof", of which said Act, Section One is in words and figures following, to-wit:

"The Common Law of England and all Statutes and Acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that Kingdom and not repugnant to or inconsistent with the Constitution of the United States and the Act entitled "An Act to organize the Territory of Nebraska and Kansas", or any Statute law which may, from time to time, be made or passed by this or any subsequent Legislative Assembly, of the Territory of Kansas, shall be the rule of action and decision in this Territory, any law, custom or usage to the contrary notwithstanding."

30 That on the first day of October, A. D., 1860, and while said statute still was in force and the law of Kansas Territory, the United States of America, by its certain Patent in writing, of that date, gave and granted unto George Gardner, all of Lot No. 5 in Section thirty (30) Township Eleven (11), Range Sixteen (16), in the district of Lands subject to sale at Lecompton, Kansas Territory, containing 12.20 acres, which said lot number five (5) in Section 30 adjoined, and was bounded by the Kansas River, and is located in what is now the County of Shawnee in the State of Kansas. That said Act of the Territorial Legislature of the State of Kansas continued in force until the 29th day of January A. D., 1861, on which date said Kansas Territory was admitted to the Union of the United States of America, as the "State of Kansas" and thereafter said act by virtue of section 4 of the Schedule in the Constitution of the State of Kansas continued to be the law of the State of Kansas until the year 1868, when the said Statute was modified in its terms, in which modified form the same has continued to be the law of the State of Kansas to this date, and appears as Section 9850 of the General Statutes of Kansas 1909, reference to which is hereby made.

That the Common Law of England governing the title and ownership of lands adjoining to streams and rivers and governing the title to and ownership of the beds of streams in which the tide does not ebb and flow, became a rule of property by its adoption as the law

of the State of Kansas, and to this day remains a rule of property in said State: That no Statute of the State of Kansas has been at any time since the admission of said state into the Union or prior thereto, enacted, modifying the common law rule of ownership of the beds of non-tidal streams, until the alleged act published as Chapter 259 of the Session Laws of Kansas, A. D. 1913, being the Act relied upon and pleaded by the plaintiff in this proceeding.

That during and at all times prior to the fourth year of the reign of James the First the said Common Law of England, and not local to that kingdom, governing the title to the beds of non-tidal rivers, to-wit; rivers and streams in which the tides of the sea do not ebb and flow, vested the ownership of the beds of such streams in the owners of the adjoining uplands and such law is not and never has been inconsistent with or repugnant to that certain Act of Congress of the United States of America entitled "An Act to organize the Territory of Nebraska and Kansas", or with or to any act of the Territorial Legislature of Kansas, or with or to any valid enactment of the Legislature of the State of Kansas. That the Kansas River is and at all times has been a non-tidal stream, in which the tide of the sea does not ebb and flow and that by reason of the premises, and under the provisions of said law, the said George Gardner became the owner of and was vested with the absolute title to all that part of the bed of the Kansas River adjoining said Lot 5 in Section 30, to the centre of the stream and between the end lines of said Lot No. 5 in Section 30, extended to the center of said stream, together with all rights, interests and privileges thereunto appertaining.

That the title of said Gardner descended through various mesne conveyances to one H. C. Root, who became the owner and now is the owner of all that part of said Lot No. 5 fronting upon and bounded on its north side by the Kansas River, and lying between the west line of the property of the Wear Sand Company, as described upon page five (5) of its (The Wear Sand Company's) answer herein, and the West line of said Lot 5.

That this defendant is in possession of that part of said Lot No. 5, immediately adjoining the said property of the said Wear Sand Company on the west and extending up stream three hundred and fifty feet more or less, under lease from said H. C. Root and has been in such possession in like right, for many years last past. That said H. C. Root has been the owner of the real estate now in possession of defendant, for more than seventeen years prior to the first day of May, A. D., 1913, claiming title and ownership to and possession of the upland and of the river bed adjoining the same to the center of the stream between the east and west end lines of said portions of Lot 5 produced northerly, as of the same title as said Lot 5 was held by said Gardner under his patent from the United States of America; and that the several successors in title of and intermediate
 32 said George Gardner and this defendant, in like manner held title to and possession of said Lot Five and the bed of the said Kansas River adjoining said Lot 5, throughout the years from October A. D., 1860, to the entry of this defendant into possession, openly,

notoriously, exclusively and under claim of ownership through and under the title deduced from said patent.

Defendant states that said H. C. Root and this defendant have at all times controverted and denied and still controvert and deny the right of plaintiff to interfere in any manner, and especially under the pretended authority of Chapter 259 of the Session Laws of Kansas, A. D. 1913, with defendant's business and the carrying on thereof, of dredging sand from the Kansas River and the defendant admits that he has dredged sand from said River, but alleges that his operations at all times have been carried on in front of and adjoining his land above described and between the bank of said river and the center of the stream, and not otherwise and that he was the absolute owner of all sand dredged therefrom; defendant states that he has at all times denied and still denies the claimed ownership of plaintiff in the bed of said Kansas River in so far as said River adjoins the said real property of this defendant; but notwithstanding the premises the plaintiff herein threatened that unless this defendant made the payments demanded by plaintiff and complied with the rules and regulations adopted by the Executive Council pursuant to the provisions of said chapter 259 of the Session Laws of 1913, of the State of Kansas; that plaintiff would seek the aid of the Courts and would enjoin this defendant from pursuing his said business of dredging and vending sand from said Kansas River where he has at all times carried on his said business; that plaintiff did actually commence proceedings for such purpose against this defendant's co-defendant, Stewart-Peck Sand Company, which proceedings still are pending and undisposed of in the District Court of Wyandotte County, Kansas.

Defendant states that inasmuch as the State of Kansas was and is the opposing claimant to the theretofore undisputed title claims and claimed rights of this defendant, by reason of which defendant was and is without access to the courts of the State, or of the United

33 States, to protect his rights and interests, except at the pleasure of said plaintiff, and, as the threatened interference with defendant's business, by plaintiff, would and did cause heavy loss and irreparable injury to defendant, this defendant, in order to protect himself from such loss and injury did pay, under protest, the several sums of money specified in plaintiff's application herein for the Alternative Writ of Mandamus.

Defendant states and alleges the fact to be that said Chapter 259 of the Session Laws of Kansas, 1913, is inapplicable to this defendant, the premises considered, inasmuch as this defendant is the owner of that portion of the bed of the said Kansas River over and upon which his operations were at all times conducted subsequent to the publication of said Chapter 259, and this defendant respectfully shows that should the provisions of said law be enforced against defendant, such enforcement would be contrary to the constitutional rights, privileges and immunities of defendant, in that defendant thereby would be deprived of his property without due process of law; would be deprived of the equal protection of the law and of the protection of equal laws and the property of defendant would be taken for public

use without compensation to this defendant, all contrary — provisions of the Constitution of the State of Kansas and of the Fourteenth Amendment of the United States Constitution, in that behalf made and provided.

Defendant refers to and adopts as his own the allegations of the third, fourth, fifth and sixth counts of the answer of his co-defendant, The Wear Sand Company, and incorporates the same herein as fully and completely as though such counts were herein set forth in *hæc verba*, and prays advantage of said counts and the recitals thereof, (which fifth and sixth counts of the answer of Wear Sand Company are the same, by adoption, as the fifth and sixth counts of the original answer of this defendant's co-defendant, Stewart-Peck Sand Company).

Defendant states that if said funds be paid into the State Treasury of the State of Kansas and into the General Fund thereof for the use of said State, defendant will be without remedy in the courts of this State or of the United States to compel restitution thereof by the

34 State, if the claim of this defendant be sustained upon hearing in a court of competent jurisdiction; that, the premises considered, it is apparent that there exists in this cause no such clear and undoubted legal right of plaintiff to the relief sought in this proceeding, as will compel or authorize the discretionary order prayed for; that plaintiff is not entitled, as of right, to have said moneys paid into the General Fund, nor will plaintiff be so entitled until the conflicting rights of said plaintiff and this defendant shall have been heard and so decided in due course of orderly procedure, by a court of competent jurisdiction; on consideration of all of which defendant respectfully avers that this court is without original jurisdiction to determine the respective claims of the parties hereto, involving the property rights of this defendant, that plaintiff should be remitted, for its remedy, if any it has, to the courts of the State having authority to hear and determine the facts in cases of conflicting claims to property, and that defendant should be dismissed hence without day.

FRANCIS C. DOWNEY,

Attorneys for Defendant F. D. Fowler.

Plaintiff consents to filing above as if in time.

JOHN S. DAWSON,

Att'y Gen'l.

Topeka, Sept. 3, 1913.

(Endorsed:) No. 18,985. Original. In the Supreme Court of the State of Kansas. The State of Kansas ex rel. John S. Dawson, Att'y Gen., Plaintiff, vs. Earl Akers, State Treasurer, et al., Defendants. Separate Answer. F. D. Fowler. Francis C. Downey, Att'y for F. D. Fowler. Filed September 3, 1913. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18985.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

v.

EARL AKERS, as State Treasurer; W. E. Davis, as State Auditor, and
F. J. Schwartz, Doing Business as the Schwartz Sand Company;
The Stewart-Peck Sand Company, a Corporation; The Stewart-Peck
Southwestern Sand Company, a Corporation; C. E. Brown, J. W.
Barry, O. A. Bennett, Louis St. Louis, F. D. Fowler, F. N. Cline,
Albert F. Brundige, Samuel Baggley, and W. B. Rhodes, a Part-
nership Doing Business as Baggley & Rhodes; The Wear Sand
Company, a Corporation, Defendants.

Separate Amended Answer of Stewart-Peck Sand Company.

Comes now Stewart-Peck Sand Company, one of the defendants herein, and answering for itself alone, the application of said plaintiff in this cause filed and as reason why the writ of mandamus should not issue herein, respectfully shows the Court:

Defendant states that it is a corporation duly incorporated under the Laws of the State of Missouri and has been duly authorized to transact its business in the State of Kansas.

Defendant admits that the State of Kansas is one of the States of the United States of America and has been such since January 29th, 1861; That the defendant Earl Akers is Treasurer and W. E. Davis is Auditor of the said State and that this defendant is engaged in the business of dredging and vending sand from the Kansas River, in the State of Kansas, and from other rivers and streams situate outside of said State; That this defendant paid the sums of money specified in plaintiff's application herein filed to said Treasurer and paid the same under protest and claims an interest in said sums of money so paid.

Defendant has no means of knowledge as to, and is not informed whether the Executive Council of the State of Kansas instructed the State Treasurer to take charge of the moneys paid in by this defendant, "as custodian" and keep said moneys in a separate account, to be known as the "River Fund" and instructed the State

36 Auditor to keep a similar account and charge the defendant

Earl Akers, State Treasurer, as custodian thereof, and is not informed and has no means of knowledge as to whether said Treasurer and Auditor so did, and defendant prays that plaintiff be required to offer due proof of said allegations insofar as the same may be material in this proceeding, but defendant admits that it claims that said sums should not be paid into the general fund of the State of Kansas, and for the reason that this defendant alleges that defendant and not the State of Kansas is the owner of the funds by

it so paid to Earl Akers as by plaintiff alleged, and is entitled to the possession of said moneys.

And Defendant states that the admissions herein contained are not sufficient to entitle the plaintiff to the writ of mandamus as prayed by said plaintiff, and that such writ should not issue in behalf of plaintiff for the following reasons:

First.

That all the allegations in plaintiff's application contained, except as herein admitted, or proof of which is prayed by this defendant, are untrue in fact.

Second.

That prior to the 29th day of January, A. D. 1861, and while the now State of Kansas was yet territory of the United States, on, to-wit; the first day of March, A. D. 1855, there was proclaimed a certain treaty theretofore, to-wit, on the 31st day of January, A. D. 1855, entered into between the United States of America, through its Commissioner, George W. Manypenny with the Wyandott tribe of Indians through its Chief and Delegates, Ton-roo-mee, Matthew Mud-eater and others, a copy of which said treaty is hereto attached, marked "Exhibit A," and made a part of this count of defendant's answer.

That the principal object of said treaty was to make provision for the admission of the Indians of said tribe to full citizenship of the United States and for the dissolution of the tribal relations then and therefore existing between said Wyandotte Indians and, in
37 connection therewith, to abolish the ownership in common of the lands of said tribe and distribute the said lands among the individual members thereof, so that after such dissolution of the tribal bonds the individual members of said tribe should hold the lands allotted to them respectively, under the provisions of such treaty, each in his own right, in fee simple absolute.

That the lands of said Wyandott tribe of Indians were located in the fork of the Missouri and Kansas Rivers, in what is now known as the County of Wyandotte, in the State of Kansas, and had a frontage of many miles on each of said Rivers.

That under and by the terms of Section II of said treaty all of the lands so owned by said Indians and located as aforesaid, were ceded to the United States of America, for the sole and only purpose that said lands should be surveyed and subdivided, and when so surveyed and when so subdivided, should be conveyed, by Patent of the United States, to the individual members of said tribe; that notwithstanding such cession, the full equitable title to said lands, with all rights appurtenant thereto, remained in said tribe of Indians and the naked legal title to said lands was held by the United States in trust for said tribe and the individual members thereof.

That the Legislature of Kansas Territory, by its act entitled "An Act Adopting The Common Law as the Rule of Action in This Territory and Regulating the Authentication of Statutes and the Taking Effect Thereof," approved February, 1859, and published as

Chapter CXXI, Territorial Acts 1859, enacted, among other things, the following, being Section I of said Act:

"The Common Law of England and all Statutes and Acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States and the Act entitled "An Act to Organize the Territory of Nebraska and Kansas" or any Statute law which may, from time to time be made or passed by this or any subsequent Legislative assembly of the Territory of Kansas shall be the rule of action
38 and decision in this Territory, any law, custom or usage to the contrary notwithstanding."

That said Statute was in full force and effect continuously from its passage until and for many years subsequent to the first day of June, A. D. 1859: That on or about said first day of June, A. D. 1859, the United States of America, having concluded its survey of said Wyandott Indian lands, issued to the individual members of said tribe, its certain patents, granting and conveying to the several allottees, the specific tracts of land to them, respectively, allotted under the provisions and terms of said treaty proclaimed March 1st, 1855, whereby said individual Indians became the owners, in fee simple, absolute, of the tracts to them, respectively, conveyed, and succeeded, insofar as the tracts to them respectively so granted were concerned, to the title of the United States herein and to the title and all of the rights and interests of said Wyandott Tribe of Indians in its own right and in the right of said Tribe under said treaty.

That thereafter, and after the admission of Kansas into the Union, the Legislature of the State of Kansas, by its certain enactment approved March 6th, 1862, recognized as continuing in force said Section One of "An Act adopting the Common Law as the Rule of Action in this Territory, etc.", hereinabove set forth, and said Statute of 1859, by virtue of Section 4 of the "Schedule" to the Constitution of the State of Kansas, continued to be the law of the State of Kansas until the year 1868, when said Act was so modified as to read as shown by Section 9850 of the General Statutes of Kansas, 1909.

That the Common Law of England as it existed prior to the fourth year of James the First, governing the title and ownership of lands adjoining to streams and rivers and governing riparian rights and the title to and ownership of the beds of streams in which the tide of the seas does not ebb and flow, became a rule of property by its adoption as the law of the State of Kansas, and to this day remains a rule of property in said State: That no statute of the State of Kansas has been, at any time since the admission of the said State into the Union, or prior thereto, enacted, modifying the Common Law
39 Rule of ownership of the beds of non-tidal streams, until the alleged act published as Chapter 259 of the Session Laws of Kansas, A. D. 1913, being the act relied upon and pleaded by the plaintiff in this proceeding.

That during and at all times prior to the fourth year of the reign of James the First of England, and not local to that kingdom, the

rule of the common law, governing the title to the beds of non-tidal rivers, to wit: rivers and streams in which the tides of the sea do not ebb and flow, vested the ownership of and title to such beds in the owners of the adjoining uplands, to the centre of the streams: That ownership of the beds of such streams by the owners of the adjoining uplands is not and never has been inconsistent with or repugnant to that certain Act of the Congress of the United States of America entitled "An Act to Organize the Territory of Nebraska and Kansas," or with or to any act of the Territorial Legislature of Kansas or with or to any valid enactment of the Legislature of the State of Kansas, or with or to the Constitution of the United States of America. That the Kansas River is and at all times has been a non-tidal stream, in which the tide does not ebb and flow and that, by reason of the premises, the individual members of the said Wyandott tribe of Indians, who became the owners of lands bounded by the Kansas River, became the owners of and acquired title to the bed of the said River to the centre thereof, which title and ownership was exclusive of any alleged right or interest of the State of Kansas therein or thereto. And that the title so acquired and vested descended from said Wyandott Indians through successive owners to the present owners of said lands.

This defendant respectfully states that it is the owner, in fee simple, of the following described real estate, all of which adjoins the Kansas River and has the said River for one of its boundaries, to-wit:

"Beginning on the south line of northeast quarter of Section Twenty (20), Township Eleven (11), Range Twenty-five, (25), three hundred and eleven and three-tenths (311.3) feet west of the Southeast Corner thereof at the Southeast corner of land, sold to Enright; thence north 67 degrees west along the east line of Enright's land six hundred ten and four-tenths (610.4) feet to the South line of the Northwest Quarter of said Section Twenty (20); thence West sixteen and four-tenths (16.4) feet to beginning":

40

Also:

"Beginning on the West line of 18th Street in Kansas City, Kansas, 439.3 feet North of the south line of the Northeast Quarter of Section 20, aforesaid; thence north 55 degrees 28' west, 215 feet; thence West 342.7 feet; thence South 23 degrees East, 110.4 feet to the northeast corner of D. C. Enright's land; thence south 67 degrees west, along the northerly line of said D. C. Enright's land to the Kansas River; thence north 26 degrees 45' West, along the Kansas River, 961.17 feet to a point 40 feet south of the centre line of Osage Avenue produced; thence East 65 feet to a point 909.1 feet west and 1,280 feet north of the Southeast Corner of Northeast Quarter of said Section 20; thence South 26 degrees 45' east, 420.6 feet; thence south 44 degrees 43' 11" East, 327.69 feet; thence East 245.15 feet to the right-of-way of the Kansas City Belt Railway; thence southeasterly along said right of way, 285 feet to the West line of 18th Street; thence south 48.3 feet to beginning":

And Also:

"All that part of said Section 20, beginning at the point of intersection of the North line of Osage Avenue in the City of Kansas City, Kansas, with the Westerly line of the Right-of-way of the Kansas City Outer-Belt Railway, said point being 920.3 feet west of the East line of said section 20; thence in a Northwesterly direction along the Westerly line of said right-of-way, and coincident therewith, which line makes a northwest angle of 54 degrees 10' with the North line of Osage Avenue, 590 feet to a point in said westerly line of right-of-way; thence in a Southwesterly direction, at right angles to said right-of-way 30 feet, more or less, to the Easterly, or left bank of the Kansas River; thence in a southeasterly direction along the left bank of the Kansas River and following its meanderings to a point in the North line produced, of said Osage Avenue; thence east along the north line of Osage Avenue 153 feet, more or less, to the point of beginning":

And Also:

"All that part of Section 20 aforesaid, beginning at the northwest corner of the southwest quarter of Section 21, Township 11, Range 25 E.; thence West to the Kansas River; thence down the said River to the East line of Section 20; thence North on the east line of Section 20 to the point of beginning, except the right-of-way of Union Terminal Company":

And Also:

"That certain tract of land beginning at a point in the East and West Centre line of Section 20 aforesaid, which point is 311.3 feet west of the Northeast corner of the southeast quarter of said Section 20; thence northwesterly on a line making a northwest angle with said east and west centre line of 67 degrees, a distance of 500 feet; thence southwesterly, at right angles to said last mentioned line to the Kansas River; thence down said River to the East and West Centre line of Section 20; thence East along the same to the place of beginning; and also three and 862/1,000 acres of land in the southeast Quarter of Section 22, Township 11, Range 25, formerly owned by Kaw River Sand Supply Company":

And Also:

"Commencing at the South line of Union Pacific Railway Company's right-of-way where it intersects the North and South Centre line dividing the Northeast Quarter of Section Eighteen (18), Township 11, Range 25; thence northwesterly along the line of said right-of-way to a point where said right-of-way intersects with the Kaw or Kansas River; thence southeasterly along said River with the meanderings thereof to a point due south of beginning; thence to beginning, (less Union Pacific Railway Company's right-of-way), containing about 36 acres":

41 And also:

"A tract of land in the southwest Quarter of Section 21, Township 11, Range 25 beginning at a point where the west line of Twelfth Street in Kansas City, Kansas intersects the south line of the right-of-way of Kansas City Southern Railway Company; thence in a westerly direction along said line of right-of-way 1314

feet to the north and south centre line of said southwest quarter of Section; thence south to the Kansas River; thence along said river in an easterly direction 1502 feet to a point in the west line of 12th Street produced south; thence North 712 feet to beginning, containing 21.12 acres, more or less":

And also:

"A certain tract of land in the City of Topeka, Shawnee County, Kansas, bounded on the west by the East line of Madison Street; on the North from Madison Street to Old River Road (less streets); east by said Old River Road, and on the south by a line varying in distance south from said Kansas River":

And:

Various and sundry other tracts of land bounded upon one side by the Kansas River and not herein specifically described.

That all of said above described lands, excepting only that located in the City of Topeka, originally were portions of the lands of the Wyandott Indians, located in the fork of the Missouri and Kansas Rivers; That said lands, in every instance, are bounded by said Kansas River and that all of said lands, excepting only the said tract in the City of Topeka, were, by the United States, allotted and patented to members of the Wyandott Tribe of Indians pursuant to the provisions of said treaty of March 1st, 1855; That upon the delivery of said patents to said several Wyandott Indians, said Indians became the owners, in fee, of that part and portion of the bed of the Kansas River adjoining to the tracts to them severally patented, to the centre of the stream and within the end lines of said Several tracts extended to said centre of the stream.

That this defendant is the successor in title and right, by mesne conveyances, of the original Indian Allottees, to the several tracts of land above described, and is the owner of the bed of the Kansas River adjoining said several tracts to the centre of the stream, in the same title and right by which the same was held by said Wyandott Tribe of Indians and by said allottees, without any diminution of right or exception whatsoever, and was such owner and held possession thereof undisturbed and without question of its right so to do for many years prior to the publication of said Chapter 259 of the Session Laws of Kansas 1913. Defendant admits that it has dredged large amounts of sand from the said Kansas River, but avers that all of said sand was dredged upon and from its own property.

Defendant states that it has at all times controverted and denied the right of plaintiff to interfere in any manner and especially under the pretended authority of said Chapter 259 of the Session Laws of Kansas for 1913, with the carrying on of its business of dredging sand from said Kansas River and at all times has denied and still denies the claimed ownership by the plaintiff of the bed of the said river where this defendant's operations were carried on; but notwithstanding the premises, the said plaintiff threatened, unless this defendant made the payments demanded by plaintiff and complied with the rules and regulations adopted by the Executive Council pursuant to the provisions of said Chapter 259 of the said

Session Laws, that plaintiff would seek the aid of its courts and enjoin defendant from pursuing its said business of dredging and vending sand from the said Kansas River where it has at all times herein mentioned carried on its business operations, and said plaintiff, in pursuance of its said threats, did commence suit in the District Court for Wyandotte County, Kansas, praying for an order enjoining this defendant from dredging said from said River, which action is still pending and undisposed of in Division #1 of said Court.

Defendant states that inasmuch as the State of Kansas was and is the opposing claimant to the theretofore undisputed claims and rights of this defendant, by reason of which defendant was without access to the Courts to protect its rights and interests except at the pleasure of said plaintiff, and as the threatened and actual interference by plaintiff with defendant's business would cause and was causing great damage to defendant, and inasmuch as the continued interference by plaintiff with defendant's business would cause heavy loss and irreparable injury to defendant, this defendant, in order to protect itself from such loss and injury did pay, under protest, the several sums of money specified in plaintiff's application herein for the alternative writ of Mandamus.

43 Defendant states and alleges the fact to be that said Chapter 259 of the Session Laws of Kansas, 1913, is inapplicable to this defendant, the premises considered, inasmuch as this defendant is the owner of that portion of the bed of said Kansas River over and upon which its said operations were at all times conducted subsequent to the publication of said Chapter 259, and this defendant respectfully shows, that should the provisions of said law be enforced against defendant, such enforcement would be contrary to and in violation of the constitutional rights, privileges and immunities of defendant, in that defendant would be thereby deprived of its property without due process of Law and would be deprived of the equal protection of the law and of the protection of equal laws, and the property of defendant would be taken for public use without compensation to this defendant, all contrary — provisions of the Constitution of the State of Kansas *of Kansas* and of the Fourteenth Amendment to the Constitution of the United States, in that behalf made and provided.

Third.

Defendant alleges that George H. Hodges is the duly elected, qualified and acting Governor of the State of Kansas; that Charles H. Sessions is the duly elected, qualified and acting State Secretary of the State of Kansas; that W. E. Davis is the duly elected, qualified and acting State Auditor of said State; that Earl Akers is the duly elected, qualified and acting State Treasurer of said State; that W. D. Ross is the duly elected, qualified and acting Superintendent of Public Instruction in said State; and John S. Dawson is the duly elected, qualified and acting Attorney General of said State, and that they, in their official capacity, form, under the

provisions of Article 9, Chapter III of the General Statutes of Kansas, 1909, a ministerial body, under the style or title of "The Executive Council," and, when duly convened in conformity to the requirements of the Statute, and acting pursuant to power conferred upon it by a valid enactment of the legislature of the State, the action of said Executive Council is binding upon the State of

Kansas and upon the citizens of said State.

44 That to said Executive Council, as a part of the duties imposed upon it by the Statute is confided the charge, care and management of all property of the State where no other provision is made by law.

That the only provisions made by the Statutes of the State of Kansas in, about and concerning the care, custody, protection and control of the navigable rivers and waters of the State and the beds and banks thereof and of the islands in such rivers and waters, are the provisions in this court hereinafter stated.

That the Kaw, or Kansas River was, at the time of the making of surveys by the United States, of the public lands of the United States within the boundaries of the now State of Kansas, meandered on both sides thereof to the full distance up said river covered by the hereinafter specified operations of the complainants; That the Missouri River is and at all times hereinafter mentioned was a meandered stream, touching upon and the thread of the stream thereof forming a part of the Eastern boundary line of, the State of Kansas.

That the Kaw, or Kansas, river lies wholly within the State of Kansas but flows directly, and without intervening obstruction, into the Missouri River, which latter stream, from the North line of the State of Kansas to its mouth, in the State of Missouri, is a navigable stream. That the Missouri river flows directly into the Mississippi River, which latter, both above the said point of junction with the Missouri River and below thence to its mouth, is a navigable stream; that the Mississippi river flows directly into and connects with, directly, the navigable waters of the high seas at the Gulf of Mexico, and that said Mississippi and Missouri Rivers, together with the said Kansas or Kaw River to the up stream extremity of the said meander lines now form, and at all times hereinafter mentioned have formed, one continuous, open and unobstructed public water-way of the United States between and from said up stream extremity of the meander lines of said Kansas River to and with the navigable waters of the high seas at and through said the Gulf of Mexico.

That by Statute duly enacted by the Legislature of the State of
45 Kansas and thereafter, in due course, becoming a law of the State of Kansas and published as Chapter 97 of the Session Laws of Kansas, 1864, the said Kansas River was declared to be a non-navigable stream and that no repeal of such act has at any time since its enactment been attempted until the year 1913, as hereinafter recited.

That superimposed upon and flowing over and upon the bed of and mixed and moving with the waters in and of said Kansas River

s a mass of disintegrated rock particles ordinarily designated and known as "Sand" and "Gravel", according to the size of the constituent particles thereof, which sand and gravel are not and never have been the bed of said stream nor the product of the disintegration by erosion or otherwise, of any stratum or strata of the bed or banks of said Kansas River or of any lands at or adjoining said stream, from the mouth thereof up stream to the head of the meander lines of said stream as fixed by the public surveys; that said sand and gravel are not a natural product of said stream at any point between its said mouth and the head of the said meander lines but are the product of and flow into said stream from and out of and mixed with the waters of its tributary streams from its headwaters to its mouth, in the banks or bed of which tributary streams the State of Kansas has not now and never had any property right or proprietary interest whatsoever.

That the sand and gravel in said Kansas River never have been and are not now fixed or immovable and never have formed and do not now form any regular, stable and fixed and immovable stratum or strata, but on the contrary, said sands and gravel at all times within and beyond the memory of man have been and yet are shifting, unfixed, migratory, elusive and fugitive in their nature, mixed and moving with the waters of the river in the direction of and with the flow of such waters and varying in speed, volume and progress with the rate of flow of the water in said stream; that such motion is not due to or of the character of natural erosion or disintegration of fixed land or strata, but results from a natural inherent law of substance, a motion ever shifting, flowing and moving onwards and forward with the waters of said stream, rendering such sand and gravel fugitive beyond confinement and partaking more of the elusive and unstable character of the waters of said stream than of the strata of the land of its fixed bed and banks.

That such sand, in its natural condition of location, is not of commercial value but is commercially useless until mechanically separated from and drained of its accompanying waters and removed from said stream. That the presence of such sand in the bed of said stream and mingled with its waters is, in fact, detrimental to the utilization of said stream for the great purposes for which, but for the presence of said sand, the said stream could and would be utilized in the service of the people and the upbuilding of the commerce of the State of Kansas, to-wit: For the purposes of navigation and as a valuable commercial highway. That in fact said sand and gravel are deposited upon and in and flowing over the bed of said stream in the unlimited quantity in which it exists constitutes a common nuisance by its accumulations, destroying navigation, filling up the natural water course, impeding the passage of the water, and, in time of high water, causing flood waters to overflow the river banks and spread out over the adjoining arable lands to the great injury and frequently the destruction of the latter, said sand and gravel accompanying said waters in their overflow and causing and forming injurious and destructive deposits upon and frequently irreparable injury to adjacent riparian lands.

That such sand and gravel can, under certain conditions, be turned into an article of utility and commerce and from time immemorial the people of the territory now within the boundary lines of the state of Kansas and the persons within said state since its organization and admission into the Union have, unquestioned, and by and under claim of common right, taken and exercised the right to take sand and gravel from the public waters and from the meandered streams within said territory, including said Kansas River; that such right has never been questioned in the State of Kansas until the present time and is common to every community of people, civilized or otherwise, and is universally allowed, admitted and unrestrained: That said Kansas River ever has been and now is claimed and admitted to be a public stream and public highway, the right to the use of which stream, its waters and products, including the sand and gravel thereip, and to take sand and gravel
47 therefrom without let or hindrance is, and always has been vested in the people within said state and by common right allowed to be so vested, subject only to such reasonable rules governing the exercise of such right and for the protection of the common right as the State might, in the exercise of its police supervision, lawfully adopt, and to the right of control for the purposes of navigation vested in the United States by the Constitution and the laws of the United States.

That Henry P. Stewart and Gus D. Welch were, in the year 1896, and for many years prior thereto, and prior to the year 1883 and continuously and uninterruptedly thereafter up to and including the 28th day of February 1896, had been engaged in the business or calling of publicly, openly and under claim of right so to do, taking and dredging sand and gravel from the said Kansas River from the mouth of said river up the same to in the vicinity of where the town or village of Turner in said State of Kansas is now situate and from the Missouri river in the States of Kansas and Missouri. That such sand was taken by said Stewart and by said Welch for the purpose of preparing the same for use by the people and diverting the same into the channels of commerce and for and to the personal profit of said Stewart and of said Welch in such operations: That said Stewart and said Welch pursued such operations upon, in and over the waters of said streams and for said recited purpose, and to their individual profit at all times to the common knowledge of all men, openly and notoriously, peaceable, without interference or molestation from the State of Kansas or any of the authorities or citizens of said State, and under open and public claim of right of them, the said Stewart and said Welch so to do: That thereafter and on or about the 27th day of February, 1896, said Henry P. Stewart and Gus D. Welch, for the purpose of more economic pursuit of, and for the extension of, their said theretofore individual operations, subscribed to, acknowledged, and caused to be recorded upon the public records of the State of Missouri, for the formation of a corporation under the laws of that state, Articles of Association, as authorized by the laws of said state of Missouri; that one of the purposes of the formation of said corporation, publicly avowed upon

the face of said Articles of Association, was the carrying
48 on of the business of dredging and loading sand in the
Kansas River in the State of Kansas and in the Missouri River
in Missouri, for dealing in and selling, buying and shipping such
sand; they, the said Stewart and Welch, subscribing for all but
two of the shares of the authorized capital stock of said corporation;
that thereafter and on the 28th day of February A. D., 1896, there
issued out of the office of the Secretary of State of the State of Mis-
souri, and under the Great Seal of said State, a certificate of Incorpor-
ation, testifying that under said articles and for the purposes
therein specified, the subscribers thereto became a body corporate
by the name of Welch-Stewart Sand Company, duly organized under
the laws of the State of Missouri; that immediately after the issue
of such certificate of incorporation, the said Henry P. Stewart and
said Gus D. Welch transferred to said corporation all of their said
business of dredging and procuring sand and gravel from the Kansas
River in the State of Kansas, and from the Missouri River in the
States of Kansas and Missouri, and all of their rights and privileges
theretofore held, enjoyed and owned by them in connection with
said business; and said corporation then and there entered upon the
enjoyment of the rights and privileges so to it by said Stewart and
said Welch transferred, and thence-forward said corporation, con-
tinuously to the present day, openly, notoriously, to the common
knowledge of all the people, has claimed and exercised the right, in
common with all persons within the State of Kansas, to dredge and
take, and has dredged and taken sand and gravel from the said
Kansas River in the State of Kansas and from the said Missouri
River on the Kansas side of the thread of the stream, without molesta-
tion, interruption, let or hindrance on the part of the State of Kan-
sas, its officers or representatives: That so far from interfering with
the claimed right of said corporation to take sand from said rivers,
said State of Kansas, through its officers thereunto duly authorized,
issued to said corporation, in express terms, its consent, in writing,
to the transaction of the said business of dredging and taking sand
from the Rivers of Kansas; That said Henry P. Stewart is still a
stockholder of said corporation, holding one half of the capital stock
thereof and said corporation still is the owner of the rights,
49 privileges, property rights and interests to it by said Stewart
and said Welch transferred and operates the same for the
benefit of said Stewart and of the successors in interest of said Welch
in said corporation in their capacity as stockholders thereof.

Defendant states that on or about the 17th day of December,
A. D. 1896, said corporation, Welch-Stewart Sand Company, by
authority of the State of Missouri, changed its corporate name, with-
out, however, changing or in any manner modifying its corporate
identity, from Welch-Stewart Sand Company to Stewart-Peck Sand
Company, and under its name so changed, is defendant in this pro-
ceeding; and defendant humbly shows that its said grantors, H. P.
Stewart and Gus D. Welch in their individual persons have and after-
wards said Welch-Stewart Sand Company, under that name and later
under its change of name to Stewart-Peck Sand Company, for the

benefit of them, said Stewart and said Welch, and of their successors in the grants, rights and privileges hereinbefore recited, has continuously, peaceably, uninterruptedly and under claim of grant from the State of Kansas and of right against all the world so to do, for more than thirty consecutive years, exercise the right, franchise, grant and power to take, remove, utilize and render commercial the sand from and out of the Kansas River from the mouth thereof to a point in the vicinity of Turner, in said State of Kansas, and from and out of the Missouri River on the Kansas side from the mouth of said Kansas River northwardly and westwardly with the meanderings of the stream to the Kansas-Nebraska line.

Defendant further respectfully represents and shows that under and by virtue of the provisions of Section 3 of Chapter 119 of the general statutes of Kansas, 1868, the common law of England, which theretofore had been the law of the Territory of Kansas and of the State of Kansas after the admission of said State into the union (except as modified by Statute), has continued in force in said State in aid of the Constitution, Statute Law, judicial decisions and the conditions and wants of the people of the state, but as modified thereby, and that said Common Law of England, except as modified in the manner aforesaid, remains in full force and effect in said state;

50 that at no time since or prior to the admission of the State of Kansas into the Union have the provisions of the said Common Law governing the rights of the individual citizens and the people within the State of Kansas in the public waters and navigable streams of the State been modified, abrogated, diminished, or in any manner changed either by constitutional or statutory law, or by the wants and conditions of the people, or by judicial decisions of the courts either of the Territory or of the State of Kansas, except as to the attempted change thereof hereinafter recited: That the rights, privileges, interests and immunities of the people within the State and of the State of Kansas, at the common law, in, to, about and concerning the public waters and navigable streams within said state, so far as determined by judicial decisions within the State, — been affirmed and confirmed absolutely as under the common law. That under and by virtue of said Common Law, the use of the public waters and streams and the products thereof and the sands and gravel flowing over the bed thereof, was a common right vested in the people and in each person of the Community, of which right no person might, by any power or claim of authority be deprived; and the title to said waters and streams, the products thereof, and said sand and gravel and of the banks and shores of such waters, where not otherwise vested, was and is vested in the State in trust for the common benefit of all of the people and of each person of the community and every person within said State; and such title is not an estate in fee and never has been otherwise held or enjoyed by the State of Kansas then as such trust estate; and each individual person within said State including defendant, is entitled to reduce to possession and ownership a fair share of the waters of said streams and the products thereof and of the sand and gravel aforesaid which right is

the property right of which the defendant may not be deprived except for public purposes and upon compensation.

That the sole claim of right made by said Executive Council to exercise authority over said Kansas River or any other of the waters of the State of Kansas, is based upon and is alleged to arise out of Chapter 259 of the Session Laws of Kansas, A. D. 1913 and that

51 under pretense of power conferred by said alleged statute upon said Council and for the purpose of obtaining money and other property of and from this defendant, said members of said council procured the Attorney General of the State of Kansas to institute an action against this defendant in the District Court of Wyandotte County, Kansas, for the purpose of enjoining this defendant from exercising its undoubted right to dredge sand from said the Kansas River, unless upon condition that defendant pay to said Earl Akers, State Treasurer, large sums of money to be determined according to certain alleged rules, represented to have been adopted by said Council under authority of said pretended act of the Legislature published as Chapter 259 of the Session Laws of Kansas, A. D. 1913; that said Attorney General did institute said suit in the District Court of the County of Wyandotte and such suit is pending therein and undetermined at this time.

Defendant states that in order to avoid the great and irreparable damage which would result to its business from the suspension of its operations in the dredging of sand then being carried on, and in order to protect its property and property rights from confiscation and destruction under proceedings in the courts of the State of Kansas which said members of said Council threatened to institute against this defendant and in order to protect the agents representatives and employes of defendant from arrest and imprisonment under prosecutions in the courts of the State, which said members of the Council threatened to begin and have prosecuted, this defendant, under protest, and at all times denying the validity of said Chapter 259, and at all times denying the right, power and authority of the members of said council to make rules and regulations concerning and fixing a price at which the sand and gravel in said rivers should be sold, did comply with said alleged rules and regulations and did pay over to said members of said Executive Council, through its agents appointed to receive the same, the moneys specified in plaintiff's application herein. That such payments were not voluntarily made but were made solely to protect the property rights of defendant from wrongful invasion, injury and destruction by the officers representing the State of Kansas, under color and cloak of

52 their official authority.

Defendant avers, that said Chapter 259 of the said Session Laws of 1913, constitutes no authority to said Executive Council, or the members thereof, to require compliance on the part of this defendant with the terms and provisions of said Chapter, for that if the provisions of said Chapter be held to apply to this defendant, defendant would thereby be deprived of its property and property rights without due process of law. That the property of this defendant would be taken for public purposes without compensation and

this defendant would be deprived of the equal protection of the laws and of the protection of equal laws, contrary to the provisions of the fourteenth amendment to the Constitution of the United States and to the provisions of the constitution of the State of Kansas in that behalf made and provided.

Fourth.

Defendant states, that on or about the 10th day of May, A. D. 1913, the State of Kansas, through and by its Attorney General, filed in the District Court of Wyandotte County, Kansas, its certain petition against this defendant whereby and by the terms of which said State claimed ownership in title absolute to the Kansas River between its banks and from bank to bank; alleges that this defendant took and converted certain sand and gravel from the bed of said stream; that said plaintiff is entitled to be paid for the sand and gravel so alleged to have been taken by this defendant, and praying judgment against this defendant for the alleged value of the sand and gravel alleged to have been so taken.

That thereafter, and on or about the 17th day of May, A. D. 1913, Charles S. Sessions, Secretary of State of the State of Kansas transmitted through the United States Mails, a certified copy of summons to him directed for service upon this defendant which certified copy of summons was received by this defendant in due course through said Mails. That said action is still pending and undetermined in said court, and such suit is of a nature that every issue of fact herein by this defendant pleaded may properly be pleaded, determined and decided in due and orderly course of procedure and every issue
53 of law and fact upon the determination of which rests the right of the State of Kansas to have the said "River Fund" turned into its general fund can be, and of right ought to be, tried, determined and decided in said cause pending in Wyandotte County. That the determination of the issues in said action of necessity must determine the right of the State to said River fund and, upon the decision in said cause to be rendered, must be and will be predicated the right of the State of Kansas to have its said Treasurer and Auditor perform the acts by this Application required of them, as an unquestioned duty, and whether the performance of said acts by said officers is due to the State of Kansas and an unquestioned duty cannot be determined until the many questions of fact upon which the ownership of said River Fund depends, shall have been decided.

Defendant respectfully represents that this proceeding is a proceeding of extraordinary nature, not designed for the trial and disposition of questions affecting the right to property between contending claimants; That defendant has a right under the provisions of the Constitution of the State of Kansas, of which defendant may not lawfully be deprived, to a hearing before a competent tribunal in the due and ordinary course of law; That this court is without jurisdiction to entertain and determine, in the first instance, questions of right to property. That were this court to entertain jurisdiction of and determine the many questions of fact necessary to be considered and decided in this proceeding before the relief sought by plaintiff

could be granted, this defendant would be deprived of the equal protection of the laws and the protection of equal laws and of equal rights before the law, and would be deprived of the property without due process of law, all contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and to the Constitution of the States of Kansas in that behalf made and provided.

Fifth.

That prior to the 29th day of January, A. D. 1861 and while the now State of Kansas was an organized Territory of the United States and on, to-wit, the — day of February, A. D. 1859, there was
54 enacted and approved and, thereafter, duly published, a certain act of the Territorial Legislature of said Territory, entitled "An Act Adopting the Common Law as the Rule of Action in this Territory, and Regulating the Authentication of Statutes and the Taking effect thereof," of which said Act Section 1 is in words and figures following, to-wit:

"The Common Law of England and all Statutes and Acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States and the Act entitled "An Act to organize the Territory of Nebraska and Kansas", or any Statute law which may, from time to time be made or passed by this or any subsequent Legislative Assembly of the Territory of Kansas shall be the rule of action and decision in this Territory, any law, custom or usage to the contrary notwithstanding."

That Section 4 of the "Schedule" to the Constitution of the State of Kansas, as the said Constitution was formed on the 29th day of July, A. D., 1859 and at the time of its acceptance by congress of the United States of America, reads as follows:

"All laws and parts of laws in force in the Territory at the time of this acceptance of this Constitution by Congress, not inconsistent with this Constitution, shall continue and remain in force until they expire or shall be repealed."

That said Section 1 of said Act of 1859, was in no wise inconsistent with the provisions or any provision of the said constitution of the State of Kansas, and said act, insofar as Section 1 thereof is concerned, did not expire by limitation and remained in full force and effect until the year 1868, when said Section was to a degree modified and, as so modified, continued to be and still is the law of the State of Kansas and appears as Section 9850 of the General Statutes of Kansas, 1909, reference to which is hereby made.

That during and at all times prior to the fourth year of the reign of James the First, the said Common Law of England, and not local to that kingdom, governing the title to the said beds of non-tidal rivers, to-wit; rivers and streams in which the tides of the sea do not ebb and flow, vested the ownership of the beds of such streams in the owners of the adjoining uplands, and such is not now and never has been inconsistent with or repugnant to that certain act of the Congress

of the United States of America entitled "An Act to Organize the Territory of Nebraska and Kansas", or with or to any Act of
55 the Territorial Legislature of the State of Kansas. That the

Kansas River is and at all times has been a non-tidal stream, in which the tide of the seas did not and does not ebb and flow, and that by and under the provisions of the said Common Law, the owners of the uplands bordering and abutting upon and adjoining said Kansas River, on both sides thereof, and bounded thereby, from its mouth up stream, in the State of Kansas, as far as the present location of the town or village of Turner in said State, had been granted and transferred by said United States to sundry individuals, and all of said upland was, in the Month of February, 1859, owned in fee simple by sundry individual owners in severalty, in fee simple absolute; and has continued to be and is now the property of sundry individuals; that under and by virtue of said the Common Law of England, adopted by this state as aforesaid, said several owners are the owners in severalty of the bed of said Kansas River insofar as their several holdings adjoining and are bounded by said river, to the thread of the stream and up and down stream within the end lines of their several holdings extended to said thread of the stream; that the state of Kansas does not now own and never has owned or held any proprietary interest in any of said lands and said proprietors are owners of such bed of the stream in fee simple and exclusive of any claim of proprietary right in the State of Kansas, subject always, however, and only, to the prescriptive rights and interest of this defendant as herein stated.

That by Statute duly enacted by the Legislature of the State of Kansas and thereafter, in due course, published as Chapter 97 of the Session Laws of the State of Kansas, 1864, the said Kansas River was declared to be a non-navigable stream and that no repeal or modification of such chapter 97 has taken place until the alleged repeal thereof by Section 6 of Chapter 259 of the Session Laws of Kansas, 1913.

That Henry P. Stewart and Gus D. Welch were, in the year 1896, and for many years prior thereto, and prior to the year 1883 and continuously and uninterruptedly thereafter up to and including the 28th day of February, 1896, had been engaged in the business
56 or calling of publicly, openly and under claim of right so to do, taking and dredging sand and gravel from the said Kansas River from the mouth of said river up the same to in the vicinity of where the town or village of Turner in said State of Kansas is now situate and from the Missouri River in the States of Kansas and Missouri. That such sand was taken by said Stewart and by said Welch for the purpose of preparing the same for use by the people and diverting the same into the channels of commerce for and to the personal profit of said Stewart and of said Welch in such operations: That said Stewart and said Welch pursued such operations upon, in and over the waters of said streams and for said recited purposes, and to their individual profit at all times to the common knowledge of all men, openly and notoriously, peaceably, without interference or molestation from the State of Kansas or any of the author-

ities or citizens of said State, and under open and public claim of right of them, the said Stewart and said Welch, so to do: That thereafter and on or about the 27th day of February, 1896, said Henry P. Stewart and Gus D. Welch, for the purpose of the more economic pursuit of, and for the extension of, their said theretofore individual operations, subscribed to, acknowledged, and caused to be recorded upon the public records of the State of Missouri, for the formation of a corporation under the laws of that State, Articles of Association, as authorized by the laws of said State of Missouri; that one of the purposes of the formation of said corporatin, publicly avowed upon the face of said Articles of Association, was the carrying on of the business of dredging and loading sand in the Kansas River in the State of Kansas and in the Missouri River in Missouri, for dealing in and selling; buying and shipping such sand, they the said Stewart and Welch subscribing for all but two of the shares of the authorized capital stock of said corporation; that thereafter and on the 28th day of February A. D., 1896, there issued out of the office of the Secretary of State of the State of Missouri and under the Great Seal of said State, a certificate of Incorporation, testifying that under said Articles and for the purpose therein specified, the subscribers thereto became a body corporate by the name of Welch-Stewart Sand Company, duly organized under the laws of said State of Missouri;

57 that immediately after the issue of such certificate of incorporation the said Henry P. Stewart and said Gus D. Welch transferred to said corporation all of their said business of dredging and procuring sand and gravel from the Kansas River in the State of Kansas, and from the Missouri River in the States of Kansas and Missouri and all of their rights and privileges theretofore held, enjoyed and owned by them, in connection with said business; and said corporation then and there entered upon the enjoyment of the rights and privileges so to it by said Stewart and said Welch transferred and thenceforward said corporation continuously to the present day, openly, notoriously, to the common knowledge of all of the people, has claimed and exercised the right to dredge and take, and has dredged and taken sand and gravel from the said Kansas River in the State of Kansas and from the said Missouri River on the Kansas side of the thread of the stream, without molestation, interruption, let or hindrance on the part of the State of Kansas, its officers or representatives: That so far from interfering with the claimed right of said corporation to take sand from said rivers, said State of Kansas, through its officers thereunto duly authorized, issued to said corporation, in express terms, its consent, in writing, to the transaction of the said business of dredging and taking sand from the Rivers of Kansas; That said Henry P. Stewart is still a stockholder of said corporation, holding one half of the capital stock thereof and said corporation still is the owner of the rights, privileges, property rights and interests to it by said Stewart and said Welch transferred and operates the same for the benefit of said Stewart and of the successors in interest of said Welch in said corporation in their capacity as stockholders thereof.

Defendant states that on or about the 17th day of December, A. D.,

1896, said corporation, Welch-Stewart Sand Company, by authority of the State of Missouri, changed its corporate name, without however, changing or in any manner modifying its corporate identity, from Welch-Stewart Sand Company to Stewart-Peck Sand Company, and under its name so changed, is defendant in this proceeding and defendant humbly shows that its said grantors, H. P. Stewart and Gus D. Welch, in their individual persons, have and afterwards said Welch-Stewart Sand Company, under that name and 58 later under its change of name to Stewart-Peck Sand Company, for the benefit of them, said Stewart and said Welch, and of their successors in the grants, rights and privileges hereinbefore recited, has continuously, peaceably, uninterruptedly, openly notoriously and under claim of right against all the world so to do, for more than thirty consecutive years, exercised the right, franchise, grant and power to take, remove, utilize and render commercial the sand from and out of the Kansas River and from both sides of the thread of the stream thereof, from the mouth thereof to a point in the vicinity of Turner in said State of Kansas.

That the sole claim of right made by the Executive Council of the State of Kansas to exercise authority over said Kansas River or any other of the waters of the State of Kansas, is based upon and is alleged to arise out of Chapter 259 of the Session Laws of Kansas, A. D., 1913, and that under pretense of power conferred by said alleged statute upon said Council and for the purpose of obtaining money and other property of and from this defendant, said member of said Council procured the Attorney General of the State of Kansas to institute an action against this defendant in the District Court of Wyandotte County, Kansas, for the purpose of enjoining this defendant from exercising its undoubted right to dredge sand from said the Kansas River, unless upon condition that defendant pay to said Earl Akers, State Treasurer, large sums of money to be determined according to certain alleged rules, represented to have been adopted by said council under authority of said pretended act of the Legislature published as Chapter 259 of the Session Laws of Kansas, A. D., 1913: That said Attorney General did institute said suit in the District Court of said County of Wyandotte and such suit is pending therein and undetermined at this time.

Defendant states that in order to avoid the great and irreparable damage which would result to its business from the suspension of its operations in the dredging of sand then being carried on, and in order to protect its property and property rights from confiscation and destruction under proceedings in the courts of the State of Kansas which said members of said Council threatened to institute 59 against this defendant and in order to protect the agents, representatives and employees of defendant from arrest and imprisonment under prosecutions in the Courts of the State, which said members of the said Council threatened to begin and have prosecuted, this defendant, under protest, and at all time denying the validity of said Chapter 259, and at all times denying the right, power and authority of the members of said Council to make rules and regulations concerning and fixing a price at which the sand and gravel in

said rivers should be sold, did comply with said alleged rules and regulations and did pay to said members of said Executive Council, through its agents appointed to receive the same, the moneys specified in plaintiff's application herein; That such payments were not voluntarily made but were made solely to protect the property rights of defendant from wrongful invasion, injury and destruction by the officers representing the State of Kansas, under color and cloak of their official authority.

Defendant avers that said Chapter 259 of the said Session Laws of 1913, constitutes no authority to said Executive Council, or the members thereof, to require compliance on the part of this defendant with the terms and provisions of said Chapter, for that if the provisions of said Chapter be held to apply to this defendant, defendant would thereby be deprived of its property and property rights without due process of law: That the property of this defendant would be taken for public purposes without compensation and this defendant would be deprived of the equal protection of the laws and of the protection of equal laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and of the Constitution of the State of Kansas in that behalf made and provided.

Sixth.

Defendant further respectfully represents that said Chapter 259 of the Session Laws of Kansas, is invalid for that said Chapter contains more than one subject, and that the entire subject covered by said Act is not clearly expressed in its title, in this, that said Act in and by the terms of Section 8 thereof makes provision for a new rule of evidence in the course of procedure, and by Section 2 provides for the donation of public moneys to local quasi-public corporations for purposes not general and not generally public in their character. That by Section 6 of said Act certain real property is legislatively declared to be the property of the State of Kansas and the alleged rights of the State in such real property are defined legislatively; while the title to said Act refers solely to the taking of sand and other natural products from the beds of public rivers and natural products from lands lying in the beds of such rivers.

Seventh.

That at a session of the Legislature of the State of Kansas convened in the month of January, 1913, there was introduced in the State Senate and by the Judiciary committee of said Senate, a certain bill, designated as "Senate Substitute for House Bill No. 219", which Bill, as the same appears now published in the Statute Book as a duly enacted statute and Law of the State of Kansas, is the same law referred to by plaintiff as Chapter 259 of the Session Laws of Kansas, 1913: That said Bill thereafter was signed by the presiding officers of the Senate and House of Representatives and presented to the Governor, by whom said Bill was signed, after which said Bill was published as hereinabove stated.

Defendant states that under and by virtue of Section 15, Article II, of the Constitution of the State of Kansas, it is required that:

"Every Bill shall be read on three separate days in each house, unless in case of emergency. Two thirds of the House where such Bill is pending may, if deemed expedient, suspend the rules, but the reading of the Bill by sections on its final passage shall be in no case dispensed with."

That by the terms of Section 14 of Article II of the said Constitution of said State it is required that:

"Every Bill and joint resolution passed by the House of Representatives and Senate, shall within two days thereafter be signed by the presiding officers and presented to the Governor," etc., and defendant avers that said bill never was, in fact, read in each house, or in either house of the Legislature of the State of Kansas on three separate days, nor was an emergency declared in either house: That

61 the rules were not suspended in either house by a vote of two thirds of the house while the said Bill was pending therein and said Bill was not, in either house, read Section by Section, upon its final passage or at any other time, nor was said bill passed by a majority of all the members elected to said Senate, or to the said House or Representatives.

Defendant states that said Bill never was, in fact passed by the houses, or either house, of said Legislature in the manner and under the conditions by the provisions of the Constitution of Kansas required: That said Bill was not, within two days after its alleged passage, presented to the Governor, but said Bill was presented to the Governor as a matter of fact, more than two days after its alleged passage through the Legislature.

Defendant alleges and respectfully represents that even had said Senate Substitute for House Bill No. 219 been enacted and passed by the Houses constituting the Legislature of the State of Kansas in the manner prescribed by the Constitution of said State such bill could not and did not become a valid law of the State of Kansas in that the provisions of Sections two and three of said Act, as published in the Statute Book, constitute an invasion of the powers confided by the constitution of Kansas exclusively to the legislative and judicial branches or departments of the State government. That by said Sections two and three, it is intended and attempted to confer upon the Executive Council certain powers purely legislative and other-purely judicial in their character. That said Executive Council is a body merely administrative in Character, by law designed to assist in the performance of the duties of the Executive and never was intended to be and is not a body authorized by law to exercise legislative or judicial functions. That the exercise of the powers by said Sections 2 and 3 of said act attempted to be conferred upon said Executive Council must, of necessity, initiate with and terminate in said Council, as no authority to hear testimony is granted or attempted to be conferred upon said Executive Council must, of necessity, initiate with and terminate in said Council, as no authority to hear testimony is granted or attempted to be conferred and no appeal from any determination of said Council upon any matter

specified in said alleged enactment is provided for or permitted by said Act, nor is any person having property interests affected by said act permitted to appear and defend such interests. That by the provisions of Sections One (1) and Six (6) of said Act, riparian
62 owners upon rivers within the purview of said Act are deprived of their property without a hearing and without compensation and by other provisions of said act are compelled to pay tribute to the State of Kansas if such riparian owner would exercise his own property rights, all of which is in violation of the 18th Section of the Bill of Rights in the Constitution of the State of Kansas.

That said act is further invalid in that by its express terms it deprives the individual people within the State of Kansas, including this Defendant of the right to take and commercially utilize the sand from the public waters of the State, which right is vested absolutely in and secured to said people and to this defendant by common consent; That such right is a property right of value of which this defendant may not be deprived without compensation and that said pretended enactment makes no provision for compensation for the deprivation of this defendant of its said property rights and constitutes an arbitrary and unreasonable seizure of this defendant's property, contrary to the provisions of Section 15 of the Bill of Rights in the Constitution of the State of Kansas.

Defendant alleges that were the various provisions of said Chapter 259 hereinabove referred to permitted to be enforced against this defendant in this proceeding or otherwise, that this defendant would thereby be deprived of its property without due process of law, and would be deprived of the equal protection of the laws and of the protection of equal laws, and the property of defendant would be taken without compensation, all contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States of America, and to the provisions of the Constitution of the State of Kansas in that behalf provided.

Defendant states that if said funds be paid into the State Treasury of the State of Kansas and into the General Fund thereof for the use of said State, defendant will be without remedy in the courts of this State or of the United States to compel restitution thereof by the State, if the claims of this defendant be sustained upon hearing in
63 a court of competent jurisdiction; that, the premises considered, it is apparent that there exists in this cause no such clear and undoubted legal right of plaintiff to the relief sought in this proceeding, as will compel or authorize the discretionary order prayed for; that plaintiff is not entitled, as of right, to have said moneys paid into the general fund, nor will plaintiff be so entitled until the conflicting rights of said plaintiff and this defendant shall have been heard and so decided in due course of orderly procedure, by a court of competent jurisdiction; on consideration of all of which defendant respectfully avers that this court is without original jurisdiction to determine the respective claims of the parties hereto, involving the property rights of this defendant, that plaintiff should be remitted for its remedy, if any it has, to the courts of the State having authority to hear and determine the facts in cases of conflicting

claims to property, and that defendant should be dismissed hence without day.

JOHNSON & LUCAS,
McANANY & ALDEN,
FRANCIS C. DOWNEY,

Attorneys for Defendant, Stewart-Peck Sand Company.

Endorsed: #18985. Original. In the Supreme Court of the State of Kansas. The State of Kansas, ex rel. John S. Dawson, Att'y Gen'l, Plaintiff, vs. Earl Akers, State Treasurer et al., Defendant. Separate Amended Answer of Stewart-Peck Sand Co. Johnson & Lucas, McAnany & Alden, Francis S. Downey, Att'ys for Answering Def't. Filed Sep. 3 1913. D. A. Valentine, Clerk Supreme Court.

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EXHIBIT "A."

Franklin Pierce, President of the United States of America, to all and singular to whom these presents shall come, greeting:

Whereas a treaty was made and concluded at the city of Washington on the thirty-first day of January, in the year of our Lord one thousand eight hundred and fifty-five, by George W. Manypenny, as commissioner on the part of the United States and the following chiefs and delegates of the Wyondott tribe of Indians; viz: Tan-roo-mee, Matthew Mudeater, John Hicks, Silas Armstrong, George J. Clark and Joel Walker, they being thereto duly authorized by said tribe, which treaty is in the words following, to-wit:

Articles of Agreement and convention made and concluded at the City of Washington on the thirty-first day of January, one thousand eight hundred and fifty-five, by George W. Manypenny, as commissioner on the part of the United States, and the following-named chiefs and delegates of the Wyandotte tribe of Indians, viz: Tan-roo-mee, Matthew Mudeator, John Hicks, Silas Armstrong, George J. Clark, and Joel Walker, they being thereunto duly authorized by said tribe.

Article I. The Wyandott Indians having become sufficiently advanced in civilization, and being desirous of becoming citizens, it is hereby agreed and stipulated that their organization and their relations with the United States as an Indian tribe shall be dissolved and terminated on the ratification of this agreement, except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification the said Wyandotte Indians, and each and every of them, except as hereinafter provided, shall be deemed, and are hereby declared, to be citizens of the United States, to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens; and shall in all respects be subject to the laws of the United States and of the Territory of Kansas in the same manner as other citizens of said Territory; and the jurisdiction of the United States and of said Territory shall be extended over the Wyandotte country in the same manner as over other parts of said

Territory. But such of the said Indians as may so desire, and make application accordingly to the commissioners hereinafter provided for, shall be exempt from the immediate operation of the preceding provisions extending citizenship to the Wyandott Indians, and shall have continued to them the assistance and protection of the United States and an Indian agent in their vicinity for such limited period or periods of time, according to the circumstances of the case, as shall be determined by the Commissioner of Indian Affairs; and on the expiration of such period or periods the said exemption, protection, and assistance shall cease; and said persons shall then, also, become citizens of the United States, with all the rights and privileges, and subject to the obligations above stated and defined.

Article II. The Wyandott Nation hereby cede and relinquish to the United States all their right, title, and interest in and to the tract of country situate in the fork of the Missouri and Kansas Rivers, which was purchased by them of the Delaware Indians, by an agreement dated the fourteenth day of December, one thousand eight hundred and forty-three, and sanctioned by a joint resolution of Congress approved July twenty-fifth, one thousand eight hundred and forty-eight, the object of which cession is, that the said lands shall be subdivided, assigned, and reconveyed, by patent, in fee-simple, in the manner hereinafter provided for, to the individuals and members of the Wyandott Nation, in severalty, except as follows, viz: That portion now enclosed and used as a public burying-ground shall be permanently reserved and appropriated for that purpose; two acres, to include the church-building of the Methodist Episcopal Church, and the present burying-ground connected therewith are hereby reserved, granted, and conveyed to that church; and two acres, to include the church-building of the Methodist Episcopal Church, South, are hereby reserved, granted, and conveyed to said church. Four acres, at and adjoining the Wyandott ferry, across and near the mouth of the Kansas River, shall also be reserved, and, together with the rights of the Wyandotts in said ferry, shall be sold to the highest bidder among the Wyandott people, and the proceeds of sale paid over to the Wyandotts. On the payment of the purchase-money in full, a good and sufficient title to be secured and conveyed to the purchaser by patent from the United States.

Article III. As soon as practicable after the ratification of this agreement the United States shall cause the lands ceded in the preceding article to be surveyed into sections, half and quarter sections to correspond with the public surveys in the Territory of Kansas; and three commissioners shall be appointed, one by the United States and two by the Wyandott council, whose duty it shall be to cause any additional surveys to be made that may be necessary, and to make a fair and just division and distribution of the said lands among all the individuals and members of the Wyandott tribe, so that those assigned to or for each shall, as nearly as possible, be equal in quantity, and also in value, irrespective of the improvements thereon; and the division and assignment of the lands shall be so made as to include the houses, and, as far as practicable, the other improvements,

of each person or family, be in as regular and compact a form as possible, and include those for each separate family altogether.

66 The judgment and decision of said commissioners on all questions connected with the division and assignment of said lands shall be final.

On the completion of the divisions and assignment of the lands as aforesaid, said commissioners shall cause a plat and schedule to be made, showing the lands assigned to each family or individual, and the quantity thereof. They shall also make up carefully prepared lists of all the individuals and members of the Wyandott tribe—those of each separate family being arranged together—which lists shall exhibit, separately, first, those families, the heads of which the commissioners, after due inquiry and consideration shall be satisfied are sufficiently intelligent, competent, and prudent to control and manage their affairs and interests, and also all persons without families.

Second, those families the heads of which are not competent and proper persons to be entrusted with their shares of the money payable under this agreement; and third, those who are orphans, idiots, or insane. Accurate copies of the lists of the second and third of the above classes shall be furnished by the commissioners to the Wyandott council; whereupon said council shall proceed to appoint or designate the proper person or persons to be recognized as the representatives of those of the second class, for the purpose of receiving and properly applying the sums of money due and payable to or for them, as hereinafter provided, and also those who are to be entrusted with the guardianship of the individuals of the third class, and the custody and management of their rights and interests; the said acts or proceedings of the council, duly authenticated, to be forwarded to the Commissioner of Indian Affairs, and filed in his office; and the same shall be annually revised by the said council, until the payment of the last instalment of the moneys payable to the Wyandotts under this agreement, and such change or changes made therein as may, from casualties or otherwise, become necessary; such revisions and changes, duly authenticated, to be communicated to, and subject to the approval of the Commissioner of Indian Affairs.

The aforesaid plat and schedule and lists of persons, duly authenticated by the commissioners, shall be forwarded to the Commissioner of Indian Affairs and filed in his office, and copies of the said plat and schedule and of the list of persons temporarily exempted from citizenship and entitled to the continued protection and assistance of the United States and an Indian agent, duly attested by the commissioners, shall be filed by them in each of the offices of the secretary of the Territory of Kansas and the clerk of the county in which the Wyandott lands are situated.

Article IV. On the receipt, by the Commissioner of Indian Affairs, of the plat and schedule, lists of persons, and of the first proceedings of the Wyandotte council, mentioned in the next preceding

67 article, patents shall be issued by the General Land-Office of the United States, under the advisement of the Commissioner of Indian Affairs, to the individuals of the Wyandott tribe, for the lands severally assigned to them, as provided for in the third article

of this agreement, in the following manner, to wit: To those reported by the commissioners to be competent to be entrusted with the control and management of their affairs and interests, the patents, shall contain an absolute and unconditional grant in fee-simple, and shall be delivered to them by the Commissioner of Indian Affairs as soon as they can be prepared and recorded in the General Land-Office; but to those not so competent the patents shall contain an express condition that the lands are not to be sold or alienated for a period of five years, and not then without the express consent of the President of the United States first being obtained; and the said patents may be withheld by the Commissioner of Indian Affairs so long as, in his judgment, their being so withheld may be made to operate beneficially upon the character and conduct of the individuals entitled to them.

None of the lands to be thus assigned and patented to the Wyandotts shall be subjected to taxation for a period of five years from and after the organization of a State government over the territory where they reside; and those of the incompetent classes shall not be aliened or released for a longer period than two years, and shall be exempt from levy, sale, or forfeiture, until otherwise provided by State legislation, with the assent of Congress.

Article V. Disinterested persons, not to exceed three, shall be appointed by the Commissioner of Indian Affairs, to make a just and fair appraisalment of the parsonage houses, and other improvements connected therewith, on the Wyandott lands belonging to the Methodist Episcopal Church and the Methodist Episcopal Church South, the amounts of which appraisements shall be paid to the said churches, respectively, by the individual or individuals of the Wyandott tribe to whom the lands on which said houses and improvements are shall have been assigned under the provisions of this agreement; said payments to be made within a reasonable time, in one or more instalments, to be determined by said appraisers; and, until made in full, no patent or other evidence of title to the lands so assigned to said individual or individuals shall be issued or given to them.

Article VI. The Wyandott Nation hereby relinquish and release the United States from all their rights and claims to annuity, school moneys, blacksmith establishments, assistance and materials
 68 employment of an agent for their benefit, or any other object or thing of a national character, and from all stipulations and guarantees of that character, provided for or contained in former treaties, as well as from any and all other claims or demands whatsoever as a nation, arising under any treaty or transaction between them and the Government of the United States. In consideration of which release and relinquishment the United States hereby agree to pay to the Wyandott Nation the sum of three hundred and eighty thousand dollars, to be equally distributed and paid to all the individuals and members of the said nation, in three annual instalments, payable in the months of October, commencing the present year; the shares of the families whose heads the commissioners shall have decided not to be competent or proper persons to receive the same, and those of orphans, idiots, and insane persons, to be paid to and re-

cepted for by the individuals designated or appointed by the Wyandott council to act as their representatives and guardians.

Such part of the annuity, under the treaty of one thousand eight hundred and forty-two, as shall have accrued, and may remain unpaid at the date of the payment of the first of the above mentioned instalments, shall then be paid to the Wyandotts, and be in full and final discharge of said annuity.

Article VII. The sum of one hundred thousand dollars, invested under the treaty of one thousand eight hundred and fifty, together with any accumulation of said principal sum, shall be paid over to the Wyandotts, in like manner with the three hundred and eighty thousand dollars mentioned in the next preceding article, but in two equal anual instalments, commencing one year after the payment of the last instalment of said above-mentioned sum. In the mean time the interest on the said invested fund, and on any accumulation thereof, together with the amount which shall be realized from the disposition of the ferry and the land connected therewith, the sale of which is provided for in the second article of this agreement, shall be paid over to the Wyandott council, and applied and expended, by regular appropriation of the legislative committee of the Wyandott Nation, for the support of schools, and for other purposes of a strictly national or public character.

Article VIII. The persons to be included in the apportionment of the lands and money to be divided and paid under the provisions of this agreement shall be such only as are actual members of the Wyandott Nation, their heirs and legal representatives, at the date of the ratification hereof, and as are entitled to share in the property and funds of said nation, according to the laws, usages, and customs thereof.

Article IX. It is stipulated and agreed that each of the individuals to whom reservations were granted by the fourteenth article of the treaty of March seventeenth, one thousand eight hundred and forty-two, or their heirs or legal representatives, shall be permitted to select and locate said reservation on any Government lands west of the States of Missouri and Iowa, subject to pre-emption and settlement, said reservations to be patented by the United States, in the names of the reservees, as soon as practicable after the selections are made; and the reservees, their heirs or proper representatives, shall have the unrestricted right to sell and convey the same whenever they may think proper; but, in cases where any of said reservees may not be sufficiently prudent and competent to manage their affairs in a proper manner, which shall be determined by the Wyandott council, or where any of them have died leaving minor heirs, the said council shall appoint proper and discreet persons to act for such incompetent persons and minor heirs in the sale of the reservations, and the custody and management of the proceeds thereof, the persons so appointed to have full authority to sell and dispose of the reservations in such cases, and to make and execute a good and valid title thereto.

The selections of said reservations, upon being reported to the surveyor-general of the district in which they are made, shall be

entered upon the township plats and reported, without delay to the Commissioner of the General Land-Office, and patents issued to the reservees accordingly. And any selection of, settlement upon, or claim to, land included in any of said reservations made by any other person or persons after the same shall have been selected by the reservees, their heirs, or legal representatives, shall be null and void.

Article X. It is expressly understood that all the expenses connected with the subdivision and assignment of the Wyandott lands, as provided for in the third article hereof, or with any other measure or proceeding which shall be necessary to carry out the provisions of this agreement, shall be borne and defrayed by the Wyandotts, except those of the survey of the lands into sections, half and quarter sections, the issue of patents, and the employment of the commissioner to be appointed by the United States, which shall be paid by the United States.

Article XI. This instrument shall be obligatory on the contracting parties whenever the same shall be ratified by the President and the Senate of the United States.

Proclaimed March 1, 1855.

70 Be it further remembered, that afterward, on the 19th day of September, A. D. 1913, the consent of the court having been first obtained, there was filed in the office of the clerk of the supreme court of the state of Kansas, the Separate, Supplemental and Further Answer of F. D. Fowler, one of the defendants herein, which separate, supplemental and further answer is in the words and figures as follows, to-wit:—

71 In the Supreme Court of the State of Kansas.

No. 18985.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

vs.

EARL AKERS, as State Treasurer; W. E. DAVIS, as State Auditor; F. J. Schwartz, Doing Business as the Schwartz Sand Company; The Stewart-Peck Sand Company, a Corporation; C. E. Brown, J. W. Barry, O. A. Bennett, Louis St. Louis, F. D. Fowler, F. N. Cline, Albert F. Brundige, Samuel Baggley, and W. B. Rhodes, a Partnership Doing Business as Baggley & Rhodes; The Wear Sand Company, a Corporation, Defendants.

Separate Supplemental and Further Answer of F. D. Fowler.

Comes now F. D. Fowler, one of the defendants above named and for his supplemental and further answer to the application of plaintiff in this case filed, and as further reasons why the Writ of Mandamus should not issue herein, shows to the court:

Defendant, F. D. Fowler, for his supplemental answer to the answer hereto filed herein for him, by Francis C. Downey, says that he is the lessee of H. C. Root, proprietor and owner of the land occupied by him, who has owned the same since 1886, through *mense* conveyances from the Government of the United States of America since 1859. That this defendant has occupied the land he is now located upon or other portions of said Lot 5, of section 30, in Township 11, of range 16, in Shawnee County, Kansas, for more than twenty years, and during all of said time has been engaged in the business of dredging sand from the Kansas River for commercial purposes, dredging said sand out of the river bed between the banks of said Lot 5 and the middle or thread of said Kansas River.

That the United States of America obtained the territory, of which said Lot 5 is a part, from the Republic of France in 1803, by what is known as the Louisiana Purchase. At that time, 72 it was the law of the United States of America that in all cases where the opposite banks of any stream not navigable belong to different persons the stream and the bed thereof shall become common to both, which act was passed by the United States Congress May 18th, 1796, and was still the law in 1860 when the United States of America issued its patent deed to said George Gardner for said Lot 5 aforesaid.

The Kansas River is not a navigable stream now, nor was it navigable when this government acquired the territory known as the Louisiana Purchase from the Republic of France in 1803. Therefore, when this Government sold said Lot 5 it included the adjoining bed of the Kansas River to the center or thread of said river, and this defendant's lessor, H. C. Root, is now the owner through a chain of conveyances from the patentee, George Gardner, and in possession of said portion of Lot 5, including the bed of the Kansas River to the middle or thread of the same.

Second. This answering defendant further says, that in the alternative, if this court should hold that the Common Law, although being the law of the Territory of Kansas when the United States of America issued its patent to said George Gardner to said Lot 5, in 1860, and while Kansas was still a territory; and although, under the laws of the United States of America at that time its patents carried title to purchasers of land to the middle or thread of all non-navigable streams; that nevertheless, this court should hold that because the Kansas River was meandered by the Government when it was surveyed in 1854 and therefore a navigable stream, that the purchasers of lands upon the banks of the Kansas River only took title to the waters edge, leaving the title of the bed of the Kansas River in the United States of America, as provided in the United States statutes in section 5251, which was enacted in 1811, and was the law when Lot 5 was patented in 1860, and is still the law, this section provides:

"All the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways." Therefore, if the Kansas River is a navigable stream then

the title to the bed of the same is still in the United States of America, which now holds it in trust for all the people of the State of Kansas, subject to such riparian rights as is incident to the holdings of lands bordering upon navigable water of the United States of America.

That the people of the Territory of Kansas, July 29th, 1859, adopted, by vote of the electors of said territory, its constitution and in the Ordinance expressly provided:

"Whereas, the government of the United States is the proprietor of a large portion of the lands included in the limits of the state of Kansas as defined by this constitution,

Therefore and Whereas, the State of Kansas will possess the right to tax said lands for the purpose of government, and for other purposes,

Now, therefore, be it ordained by the people of Kansas (sec. 73) that the right of the state of Kansas to tax such lands is relinquished forever, and the state of Kansas will not interfere with the title of the United States to such lands, nor any regulation of Congress in relation thereto."

That the United States Congress, January 29th, 1861, approved the constitution previously adopted by the people of the territory of Kansas, and admitted the territory of Kansas as one of the states of the Union upon the following express condition, to-wit:

"The following propositions are hereby offered to the people of Kansas for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the state of Kansas, to-wit" (Sec. 5, a part of which provides,) "Provided, that the foregoing propositions hereinbefore offered are on the condition that the people of Kansas shall provide by ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulation Congress may find necessary for securing the title in said soil to bona fide purchasers thereof." (Sixth) "That the said state shall never tax the lands or the property of the United States in said state."

Defendant therefore says that the Writ of Mandamus should not be granted in this case:

1st. Because this defendant's lessor, H. C. Root, holds title to said Lot 5, through a continuous chain of conveyances from the United States Government, which title was conveyed while the Common law was in force in the Territory of Kansas, by the terms of which the patents of the United States conveyed title to the middle or thread of all non-navigable streams or rivers to lands adjoining or fronting on said streams or rivers.

2nd. If said Kansas River is a navigable stream by reason that the surveyors meandered its banks when surveyed by the Government in 1854, and canoes can be rowed on said river, then, under the laws of the United States of America when said Lot 5 was patented, the Government of the United States retained the title to the bed of the same and has never conveyed it to the State of Kansas; and the State of Kansas has agreed to never

tax the property of the United States situated within the boundaries of the State of Kansas.

HIRAM C. ROOT,
Attorney for F. D. Fowler.

Endorsed: No. 18,985. Supreme Court of Kansas. The State of Kansas, ex rel. John S. Dawson, Attorney General, Plff, vs. Earl Akers, as State Treasurer, W. E. Davis, as State Auditor, et al., De'fs. Separate Supplemental and Further Answer of F. D. Fowler. Filed Sep. 19, 1913. D. A. Valentine, Clerk Supreme Court. H. C. Root, Att'y for F. D. Fowler.

75 Be it further remembered, that afterward, on the 8th day of October, A. D. 1913, the consent of the court having been first obtained, there was filed in the office of the clerk of the supreme court of the state of Kansas, an Amendment to the answer of the defendant The Wear Sand Company, which Amendment is in the words and figures as follows, to-wit:

76 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

vs.

EARL AKERS, as State Treasurer, et al., Defendants.

Amendment to Answer of the Defendant Wear Sand Co.

Comes Now Wear Sand Company by Francis C. Downey, its attorney and leave of the Court having first been obtained, amends its answer herein filed by striking from Page Five (5) of said answer all that part thereof which is descriptive of the alleged real estate holdings of said defendant, and beginning with the words, "Beginning at a point on Lot 5 where the West line of Van Buren Street produced, etc.", and ending with the words, "165 feet to the West line of Van Buren Street, produced, to the place of beginning.", and inserting in lieu thereof the following, which is the true description of the real estate holdings of said defendant:

"All that part of Lot #5 in Section 30, Township 11, Range 16, East of the sixth principal meridian, to-wit: Beginning at the point of intersection of the West line of Van Buren Street in the City of Topeka, produced northerly with a certain line which is run in an easterly direction, at an angle of 98 degrees 44' from the east line of Harrison Street in said City, produced northerly, which line begins at an iron pin, located on said east line of Harrison Street, as aforesaid, at a point which is 612.4 feet north from an iron pin located at the northeast corner of First Avenue and said Harrison Street said angle of 98 degrees 44' being the southeast corner of said diverging lines; from said point of beginning running easterly along said line of divergence, at the angle aforesaid from the east line of Harrison Street, produced northerly to a point which is forty feet

northerly from the centre line of the main Sewer of the City of Topeka, as said sewer is laid and constructed over and upon said Lot #5 of Section #30; thence northeasterly at an angle of 138 degrees 50' (said angle being to the northwest of the point of divergence), and forth feet from and parallel with the said centre line of main sewer to the Kansas River; thence westerly along said Kansas River to the point of intersection of the west line of Van Buren Street produced northerly across said Lot #5 with the Kansas River; thence southerly along said west line of Van Buren Street produced to the point of beginning, together with all the riparian rights appurtenant to said described real estate."

THE WEAR SAND COMPANY,
By FRANCIS C. DOWNEY,

Its Attorney.

77 Endorsed: 18985. In the Supreme Court of the State of Kansas. The State of Kansas, ex rel. John S. Dawson, Att'y Gen'l Plaintiff, vs. Earl Akers, as State Treasurer, et al., Defendants. Amendment to Answer of Wear Sand Company. Francis C. Downey, Att'y for Wear Sand Co. Filed Oct. 8, 1913. D. A. Valentine, Clerk Supreme Court.

78 Be it remembered, that on the 14th day of November, 1913, there was filed in the office of the clerk of the supreme court of the state of Kansas, the separate, supplemental, Amended answer of the Stewart-Peck Sand Company, one of the defendants herein, which amendment to the Answer together with the exhibit attached thereto is in the words and figures as follows to-wit:

79 In the Supreme Court of the State of Kansas.

No. 18985.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

vs.

EARL AKERS, State Treasurer, et al., Defendants.

Separate Supplemental Amended Answer of Stewart-Peck Sand Company.

Comes now Stewart-Peck Sand Company one of the defendants herein, and for supplemental amended answer to the application of plaintiff in this cause filed, and as a further reason, why the writ of Mandamus should not issue herein respectfully shows to the Court:

That this defendant the Stewart-Pack Sand Company obtained from the Government of the United States, through its War Department a permit to dredge sand from the Kansas River, long before the passage of the act of the Legislature of the State of Kansas, under the provisions of which, this suit is brought; that said permit is still in full force and effect, and was given in the interests of navigation;

that the government of the United States has a superior right over said river for the purpose of improving the navigation, either by its own officers, agents and employees, or through others, and this defendant in taking sand from said river, is preventing its accumulation in such manner as to impede the navigation thereof, and thus aiding the United States in maintaining said river as a navigable stream, and plaintiff has no right to interfere with this defendant in so doing. Wherefore this defendant says the writ asked for by plaintiff should not be granted.

JOHNSON & LUCAS,
McANANY & ALDEN,
FRANCIS C. DOWNEY,
Att'ys for Stewart-Peck Sand Co.

80 Endorsed: No. 18985. The State of Kansas ex Rel. John S. Dawson, Att'y General, Plaintiff, vs. Earl Akers, State Treasurer et al., Defendants. Separate Supplemental Amended Answer of Stewart-Peck Sand Company. Johnson & Lucas, McAnany & Alden, Francis C. Downey, Att'ys for Stewart-Peck Sand Co. Filed Nov. 14 1913. D. A. Valentine, Clerk Supreme Court.

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Misc. 94b.

War Department.

United States Engineer Office.

Postal Telegraph Building.

KANSAS CITY, Mo., January 22, 1913.

From: District Officer.

To: Stewart-Peck Sand Co., Kansas City, Mo.

Subject: Permit for operating sand dredge.

Referring to the application of Stewart-Peck Sand Co. for authority to dredge sand from the Kansas River at mouth to Turner, Kansas, I have the honor to inform you that by authority of the Secretary of War, based upon the recommendations of the Chief of Engineers and the local engineer officer, the said Stewart-Peck Sand Co. is hereby authorized to dredge sand from the Kansas River on the following conditions:

1. That the work herein authorized shall be subject to the supervision and approval of the local district engineer officer, United States Army, whose office is at Kansas City, Mo., and who may temporarily suspend the work at any time if, in his judgment, the interests of navigation so require.

2. That if, in the judgment of said engineer officer, lights should be displayed during the progress of the work, they must be maintained in accordance with the rules and regulations established by the Secretary of Commerce and Labor, and with prior permission of the Commissioner of Lighthouses.

3. That if the material dredged is to be deposited on or adjacent to the banks of any waterway, or in any navigable water of the United States, it shall be deposited to the satisfaction of the said engineer officer in accordance with his prior permission or instructions; either behind good and substantial bulkhead or bulkheads constructed in such manner as will prevent escape of the material into the waterway, or at such dumping ground as may be designated by him.

4. That if not previously revoked, the authority shall expire three years after the date of this instrument.

5. That if inspection or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the applicants.

6. It is understood that this instrument simply gives, for the work herein authorized under the said act of Congress, consent of War Department so far as concerns the interests of navigation; that it is not to be construed as granting any property rights in material dredged, (that being a matter for adjustment between parties removing same and the riparian owner or other persons who may claim ownership under State Laws and regulations); that it does not authorize any injury to private property or invasion of private rights, nor any infringement of State laws or regulations, nor does it obviate the necessity for a full compliance with such laws and regulations.

82 7. That no dredging shall be done within 100 feet of any dike, revetment or other regulation work or established harbor line, or within 500 feet of any bridge.

8. That when occupying the channel, the dredge and barged shall be immediately removed from the channel for the passage of any vessel or craft.

9. That the barges and dredges shall not be maneuvered or moved by cable or rope connected to the shore, nor shall any cable or rope hold them to shore or to bridge piers. They must be towed to the dredging point and anchored there, and towed again to shore by means of a suitable towboat. No plant shall be anchored in the channel over night.

Please acknowledge receipt.

By authority of the Secretary of War:

(Signed)

HERBERT DEAKYNE,

Major, Corps of Engineers.

Endorsed: 18985. Exhibit to Supplemental Answer of Stewart-Peck Sand Co. Filed Dec. 3, 1913. D. A. Valentine, Clerk Supreme Court.

83 Be it further remembered, that on the 18th day of November, 1913, there was filed in the office of the clerk of the supreme court of the state of Kansas, the Motion of the plaintiff to Quash the returns of the defendants, which motion to quash is in the words and figures as follows, to-wit:

84 In the Supreme Court of the State of Kansas.

#18985.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

vs.

EARL AKERS, as State Treasurer; W. E. DAVIS, as State Auditor, and
F. J. Swartz, Doing Business as the Schwartz Sand Company; The
Stewart-Peck Sand Company, a Corporation; The Stewart-Peck
Southwestern Sand Company, a Corporation; C. E. Brown, J. W.
Barry, O. A. Bennett, Louis St. Louis, F. D. Fowler, F. N. Cline,
Albert F. Brundige, Samuel Beggley, and W. B. Rhodes, a Part-
nership Doing Business as Baggley & Rhodes; The Wear Sand
Company, a Corporation, Defendants.

Motion to Quash.

Comes now the plaintiff and moves that the Court quash the re-
turns of each of the defendants herein and give judgment for the
plaintiff upon the questions of law arising upon the pleadings not-
withstanding the questions of fact alleged and set forth in the re-
turns of the defendants.

JOHN S. DAWSON,
Attorney General.

FRED S. JACKSON,
Of Counsel.

Endorsed: No. 18985. The State of Kansas, ex rel. John S.
Dawson, Attorney General, Plaintiff, vs. Earl Akers, as State Treas-
urer, et al., Defendants. Motion to Quash. John S. Dawson, Att'y
Gen'l; F. S. Jackson, of Counsel, Attorneys for Plaintiff. Filed
Nov. 18, 1913. D. A. Valentine, Clerk Supreme Court.

85 And be it further remembered,

That afterward, on Wednesday the 3rd day of December,
1913, the same being one of the regular judicial days of the July
Term, 1913, of the Supreme Court of the state of Kansas, before
said court in session at the Supreme Court room in the city of
Topeka, the following proceeding along others was had and en-
tered of record, in the words and figures, as follows, to-wit:

86 In the Supreme Court of the State of Kansas, Wednesday,
December 3, 1913.

No. 18985.

STATE OF KANSAS ex Rel. JOHN S. DAWSON, Att'y Gen., Plaintiff,
vs.
EARL AKERS, Treas., etc., et al., Defendants.

Journal Entry of Submission.

This cause comes on to be heard on the motuon of the defendants to quash the alternative writ of mandamus issued herein; and thereupon after oral argument by F. S. Jackson for the plaintiff, and by Francis C. Downey for the defendants, said cause is submitted on brief of counsel for both parties and taken under advisement by the court. It is further ordered that H. C. Root, one of the attorneys for the defendants be given until Wednesday, December 10th, within which to serve and file additional brief.

87 Be it further remembered, that on the 13th day of March 1914, the consent of the court having first been obtained, there was filed in the office of the clerk of the supreme court of the state of Kansas an amendment to the answer and return of said defendant Wear Sand Company, which amendment is in the words and figures as follows, to-wit:

88 In the Supreme Court of the State of Kansas.

No. 18985. Original.

STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,
vs.

EARL AKERS, as State Treasurer, et al., Defendants.

Motion of Wear Sand Company for Leave to Amend Return.

Comes now the defendant Wear Sand Company, and moves the Court for permission to amend its return herein by inserting in the proper count of said return, the following paragraph, to-wit:

"Defendant states that at the beginning of the 1913 Session of the Legislature of the State of Kansas, both houses of said Legislature adopted a certain rule of procedure governing the consideration of all legislation, whereby it was expressly provided that bills should not be read three times, but that the title only should be read when bills came up for first and second reading, and that the same was published as Chapter 259 of the Session Laws of Kansas, A. D., 1913, was not read three times in either house. Defendants allege

that said Act was read but twice at most, in the Senate, and was not read at all in the House. That Section 15 of Article 2 of the Constitution was part and parcel of the constitution presented by the people of Kansas Territory to the Congress of the United States when the admission of Kansas to the Union of States was under consideration. That said constitution was accepted by the Congress of the United States and thereby became a solemn compact between the State of Kansas and the United States of America, for the benefit and protection of all persons who thereafter might come within the governmental control of said State until such time as the citizens of such State should voluntarily abrogate said constitution or adopt a substitute therefor. That said constitution never has been abrogated or a substitute therefor adopted. That said Legislature, in the adoption of the rules aforesaid and by the passage of said Act in the manner herein recited, violated the provisions of said Section 15, Article 2, and breached the said solemn compact between the United States and said State of Kansas in regard thereto. That defendant is specially affected by the provisions of said chapter and in the manner of the adoption of said Act has been deprived of the protection of a fundamental constitutional right secured by said compact between the United States and the State of Kansas and has been deprived of the assurance of said rights given all people of the United States in its approval and acceptance of said constitution and its admission of Kansas into the Union upon the faith of the provisions thereof. That defendant is entitled to the benefit of said compact as a provision made by the United States for the protection of all of its people and now claims and invokes the benefit and protection thereof.

89

JOHNSON & LUCAS,
McANANY & ALDEN,
FRANCIS C. DOWNEY,

Attorneys for Defendant Wear Sand Company.

Receipt of copy of the within motion acknowledged this 13th day of March, A. D., 1914.

JOHN S. DAWSON,
Attorney General.

Endorsed: No. 18985. In the Supreme Court of the State of Kansas. The State of Kansas, ex rel., John S. Dawson, Attorney General, Plaintiff, vs. Earl Akers, State Treasurer, et al., Defendants. Motion for leave to Amend Return of Wear Sand Company. Johnson & Lucas, McAnany & Alden, Francis C. Downey, Att'ys for Def'ts. Filed Mar. 13, 1914. D. A. Valentine, Clerk Supreme Court.

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And also, on the 13th day of March 1914, there was filed in the office of the clerk of the supreme court of the state of Kansas, a motion for leave to amend answer and return of the defendant the Stewart Peck Sand Company, which motion with the

amendment set forth therein is in the words and figures as follows, to-wit:

91 In the Supreme Court of the State of Kansas.

No. 18985. Original.

STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,
vs.

EARL AKERS, as State Treasurer, et al., Defendants.

Motion of Stewart-Peck Sand Company for Leave to Amend Return.

Comes now the defendant Stewart-Peck Sand Company and moves the Court for permission to amend its return herein by inserting in the proper count of said return, the following paragraph, to-wit:

"Defendants state that at the beginning of the 1913 Session of the Legislature of the State of Kansas, both houses of said Legislature adopted a certain rule of procedure governing the consideration of all legislation, whereby it was expressly provided that bills should not be read three times, but that the title only should be read when bills came up for first and second reading, and that the act published as Chapter 259 of the Session Laws of Kansas, A. D. 1913, was not read three times in either house. Defendants allege that said Act was read but twice at most, in the Senate, and was not read at all in the House. That said Section 15 of Article 2 of the Constitution was part and parcel of the constitution presented by the people of Kansas Territory to the Congress of the United States when the admission of Kansas to the Union of States was under consideration. That said constitution was accepted by the Congress of the United States and thereby became a solemn compact between the State of Kansas and the United States of America, for the benefit and protection of all persons who thereafter might come within the governmental control of said State until such time as the citizens of such state should voluntarily abrogate said constitution or adopt a substitute therefor. That said constitution never has been abrogated or a substitute therefor adopted. That said Legislature in the adoption of the rules aforesaid and by the passage of said Act in the manner herein recited, violated the provisions of said Section 15, Article 2, and breached the said solemn compact between the United States and said State of Kansas in regard thereto. That defendant is specially affected by the provisions of said chapter and in the manner of the adoption of said Act has been deprived of the protection of a fundamental constitutional right secured by said compact between the United — and the State of Kansas and has been deprived of the State of Kansas and has been deprived of the assurance of said rights given all people of the United States by the United States in its approval and acceptance of said constitution and its admission of Kansas into the Union upon

the faith of the provisions thereof. That defendant is entitled to the benefit of said compact as a provision made by the United States for the protection of all of its people and now claims and invokes the benefit and protection thereof.

JOHNSON & LUCAS,
McANANY & ALDEN,
FRANCIS C. DOWNEY,
Attorneys for Stewart-Peck Sand Company.

Receipt of copy of the within motion acknowledged this 13th day of March, A. D., 1914.

JOHN S. DAWSON,
Attorney General.

92 Endorsed: 18985. In the Supreme Court of the State of Kansas. The State of Kansas, ex rel. John S. Dawson, Att'y General, Plaintiff, vs. Earl Akers, State Treasurer, et al., Defendants. Motion of Stewart-Peck Sand Company for leave to Amend return. Johnson & Lucas, McAnany & Alden, Francis C. Downey, Att'ys for Def'ts. Filed Mar. 13, 1914. D. A. Valentine, Clerk Supreme Court.

93 Be it Further Remembered, that afterward on Saturday, the 11th day of April, A. D. 1915, the same being one of the regular judicial days of the January term, 1915, of the Supreme Court of the State of Kansas, before said Court in session at the supreme court room in the city of Topeka, the following proceeding among others was had and remains of record in the words and figures as follows, to-wit:

94 In the Supreme Court of the State of Kansas, Saturday, April 11, 1915.

No. 18985.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, Att'y Gen.,
Plaintiff,
EARL AKERS, as State Treas., et al., Defendants.

Journal Entry of Judgment.

This cause comes on for decision; thereupon it is ordered and adjudged that judgment herein be entered in favor of the plaintiff and against the defendant, and that the peremptory writ of mandamus issue to the defendants, commanding them to transfer to the general revenue fund of the State of Kansas all moneys now held by you, or to be paid to you as custodian of the river fund; and further commanding you, Earl Akers, State treasurer, and W. B. Davis, State Auditor, to manage and regulate your accounts so as to charge the said State Treasury with such moneys aforesaid as part of the general revenue fund of the State of Kansas, and give

to said State Treasurer credit on the river fund for all moneys so transferred. It is further ordered that the defendants pay the costs of this proceeding taxed at \$—, and hereof let execution issue.

95 And on the same day to-wit the 11th day of April, 1915, there was filed in the office of the clerk of the supreme court of the state of Kansas, the court's written syllabus and opinion, which syllabus and opinion is in the words and figures as follows, to-wit:

96

No. 18985.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, as Attorney General, etc., Plaintiff,

v.

EARL AKERS, as State Treasurer, etc., et al., Defendants.

Syllabus by the Court.

1. Navigable Waters—Test of Navigability.—The main test of navigability in this country is ascertained by use or by public acts or declarations. The foundation for navigability in law is navigability in fact following the appropriation to public use and its publicity. The ebb and flow of the tide has nothing to do with making waters navigable. To say that waters are public is equivalent in a legal sense to saying they are navigable.
2. Same—The Kansas and the Arkansas Rivers Recognized as Navigable Streams by Acts of Congress.—By the declarations of the United States in the several acts of Congress relating to the survey and disposal of the public lands, and by other legislation relating to the western country out of which Kansas territory was carved, the Mississippi river and its navigable tributaries, which include the Kansas and the Arkansas rivers in Kansas, were constituted public highways and recognized as navigable streams in the fullest and broadest sense.
3. Same—The Strict Rule of the Common Law that Only Tidal Streams are Navigable is No Part of the Common Law of Kansas.—The supreme court of the United States having in 1851 repudiated the common law definition of navigable waters, and the same test of navigability having been repudiated by many of the states in the Union before the act of the territorial legislature of 1855 adopting the common law was enacted, the strict rule of the common law defining navigable waters was never a part of the common law of Kansas; Kansas entered the Union upon an equal footing with the other states, and upon her admission absolute property in and dominion and sovereignty over the soils under the navigable and public streams within its limits passed to the state, in trust for all the people, subject to the superior rights of the federal government with respect to navigation.

4. Same—Title to Bed of Public Stream—Not Acquired through Private Use or Occupancy.—As against the state, no title to the waters or bed of a public stream could be acquired through private use or occupancy, whether adverse or by permission, however long continued, or by prescription.
5. Same—Legislature has Power to Impose a Royalty upon the Taking of Sand from Bed of a Public Stream for Commercial Purposes.—In Kansas all the legislative power that the people possess is vested in the legislature, and it is within the power of the legislature to conserve the use of the products of the public streams for the benefit of all the people by imposing a royalty upon the taking therefrom of sand for commercial purposes, so long as it does nothing either to violate its duty to hold the title as trustee for the benefit of the people, or to interfere with the superior rights of congress to control navigation.
6. Statute—Enactment—Committee's Substituted Bill under Original Title Thereafter Passed on Its Final Reading, Where the Original had been Passed on Its First and Second Readings is Validly Passed.—Chapter 259 of the Session Laws of 1913 originated in the house of representatives as house bill No. 219. It regularly passed the house on three separate readings and went to the senate where it was read twice, separately, and referred to the judiciary committee. The committee reported another bill as a substitute, the body of which differed essentially from the original but the title remained the same, and thereafter the bill was known as substitute for house bill No. 219, and in that form was passed by the senate and the house. As the title of the bill remained the same and the substitute is germane to the title and the result accomplished was the same as if the original bill had been amended in respect of the new matters contained in the substitute bill; held, that the two separate readings of the original in the senate and the previous readings of the original in the house should be treated as sufficient to make the final passage of the substitute bill in both houses a passage upon third reading.
- 97 7. Same—Chapter 259, Laws of 1913—Valid.—Other objections to the act considered and held that it is valid and constitutional.

Original proceeding in mandamus. Opinion filed April 11, 1914.
Writ allowed.

John S. Dawson, attorney-general, for the plaintiff; Fred S. Jackson, of Topeka, of counsel.

H. C. Sluss, of Wichita, for defendant F. J. Schwartz.

Johnson & Lucas, Francis C. Downey, all of Kansas City, Mo., Edwin S. McAnany, and Maurice L. Alden, both of Kansas City, for defendants The Stewart-Peck Sand Company, et al.

Hiram C. Root, of Topeka, for defendant F. D. Fowler.

The opinion of the court was delivered by PORTER, J.:

This is an original action in mandamus, the purpose of which is to test the constitutionality of chapter 259 of the Session Laws of 1913.

The statute attempts to regulate the sale and taking of sand and other natural products from navigable rivers and streams which are the property of the state, and to provide for payment to the state of royalties for sand and other products taken from the rivers for commercial purposes.

The defendants other than the state treasurer and the state auditor are persons and firms engaged in the business of taking sand from the rivers and offering the same for sale. If the statute is constitutional it is the duty of the sand companies to pay into the state treasury the royalties fixed by the executive council, and such moneys immediately become a part of the general revenue fund, or of the state school fund, according to whether the sand was taken from islands belonging to the school fund, or from the rivers; and it would likewise become the duty of the state auditor to keep a record of such payments accordingly. The immediate question involves the duties of the state treasurer and the state auditor in the manner in which the fund derived from the sale of the sand shall be accounted for. The state, on the relation of the attorney-general, therefore brings the action to compel compliance by these officers with the duties imposed by the statute with respect to the fund. Since the act took effect payments of royalties have been made by some of the defendants under protest, and they have been joined as persons interested in the result of the litigation.

The objection that the state has other adequate remedies and that mandamus should not issue can not be sustained. The duty sought to be compelled is one of a purely public nature, and the writ of mandamus affords the appropriate remedy. (*Bobbett v. The State, ex rel. Dresher*, 10 Kan. 9, 14; *The State, ex rel., v. McLaughlin*, 15 Kan. 228.) The defendants other than the state officers are proper defendants if they have any material interest, however slight, in the result of the litigation. (*The State v. Dolley*, 82 Kan. 533, 108 Pac. 846.)

Chapter 259 of the Session Laws of 1913 is an act "relating to the removal of natural products from rivers and islands belonging to the state." The first section of the act makes it unlawful for any person to take from "the bed of any navigable river or any other river which is the property of the state of Kansas any sand, oil, gas, gravel or mineral, or any natural product whatsoever from any lands lying in the bed of any such river," except in accordance with the act.

98 Section 2 provides for obtaining the consent of the executive council of the state upon such terms as to compensation and upon such conditions as the council may determine to be just and proper, and that such compensation to the state shall be paid at such times and under such terms of supervision as the council may direct; and provides that no contract shall be entered into giving any person, company or corporation any exclusive privilege

of making purchases under the act. It also contains a provision that nothing in the act "shall prevent the taking without payment therefor of any sand or gravel to be used exclusively for the improvement of public highways or to be used exclusively in the construction of public buildings or for other public use or to be used exclusively by the person taking same for his own domestic use." The same section provides that where any navigable stream extends into or through any drainage district, one-third of the proceeds of such natural products which the state may sell from within or beneath a portion of the channel of such streams lying within such district shall be paid to the treasurer of such drainage district, to be expended only by the district for the purposes for which it was created; the other two-thirds of such proceeds to be paid into the state treasury.

In section 3 the executive council is authorized to make and publish all needful rules, terms and conditions for taking, purchasing or selling sand or other products taken from the streams of the state.

Section 6 reads as follows:

"For the purposes of this act the bed and channel of any river in this state or bordering on this state to the middle of the main channel thereof and all islands and sand bars lying therein shall be considered to be the property of the state of Kansas unless this state or the United States has granted or conveyed an adverse legal or equitable interest therein since January 29, 1861, A. D., or unless there still exists a legal adverse interest therein founded upon a valid grant prior thereto; provided, that nothing in this act shall affect or impair the rights of any riparian landowner or lawful settler upon any island which is state school land."

These are the only portions of the act which are material for the present consideration. The streams from which sand is and has been taken by the defendants are the Arkansas and Kansas rivers, both meandered streams. The Kansas river is meandered from its mouth to a point above the city of Topeka; it lies wholly within the state and empties into the Missouri river, which is likewise a meandered stream. The defendant Stewart-Peck Sand Company is the owner of several tracts of land bordering on the Kansas river. The title to some of these riparian lands was vested in Wyandotte Indian allottees by patents from the United States under the treaty of 1855. Other tracts are portions of land originally patented to Silas Armstrong, a Wyandotte Indian, under the Sandusky treaty with the Wyandottes ratified in 1842 and the treaty of January, 1855. The Stewart-Peck Sand Company derives title to its riparian lands through mesne conveyances from Indian allottees under these treaties. The Stewart-Peck Southwestern Sand Company claims the title to riparian lands along the south bank of the Kansas river in the city of Topeka, which is part of a tract patented by the United States to Thomas G. Thornton, December 5, 1861. Defendant Wear Sand Company is the riparian owner and operates upon a tract of land on the south bank of the Kansas river in the city of Topeka, and derives its title through mesne conveyances from George Gardner, to whom patent was issued by the United States October 5, 1860. These defendants

have been engaged for some years in taking sand from the Kansas river by means of dredges and pumps, and in selling the sand for commercial purposes.

The state has interposed its motion to quash the several returns of the defendant sand companies to the alternative writ, and the case is thus presented to us upon its merits.

99 Briefly summarized, the main contentions of these defendants are:

1. The common law of England, as it existed prior to 1607, having been in force in Kansas territory when the treaties with the Shawnee and Wyandotte Indians were approved, and when the patents were issued to the allottees thereunder, by the United States, and when the patents were issued to Thornton and Gardner, these defendants, derailing their several titles from such allottees and patentees, are the owners of the bed of the Kansas river adjoining their riparian holdings, between their boundary lines to the thread of the stream.

2. The title of the state to the bed of a meandered stream is not an absolute fee, which the state can dispose of as it wishes; but such title is vested in it in trust for the benefit and common right of all the people, for the purposes for which such property has been used from time immemorial, viz., the common right of passage, of fishing, of the use of the waters for domestic, agricultural and commercial purposes, and therefore the state has no proprietary right in the bed of the stream or in the water which it can sell.

3. The sands in the Kansas river form no part of its bed. They are foreign to the stratification of its bed and banks and flow into it from the upper reaches of its tributaries, beyond meander lines and beyond state lines; that these sands are in constant motion, unstable and unfixed in place, and are *feræ naturæ* in character and become the property of the one first reducing them to possession; that the common right to reduce and subject them to personal dominion is a property right of value of which the defendants can not lawfully be deprived without compensation.

4. That the right to take sand from the river is a right which under the common law may be obtained by prescription, even as against the sovereign, and that the long-continued usage by the Stewart-Peck Sand Company under claim of right to take sand and gravel from the Kansas river has ripened into a vested estate from which it can not be deprived without compensation.

5. That chapter 259 of the Session Laws of Kansas was not legally adopted by the legislature.

The first question which we will notice is the authority of the state over the beds of navigable streams and its interest as owner therein. It may be assumed that the legislature in adopting the act in question relied to a large extent upon the recent decision of this court in *Dana v. Hurst*, 86 Kan. 947, 122 Pac. 1041, where it was ruled in the syllabus as follows:

"The title to the bed of the Arkansas river within the boundaries of Kansas is in the state."

Mr. Justice West, speaking for the court, said:

"It is not pretended that the river is now navigated or navigable

in fact in Kansas, and the court, as well as everybody else, knows that it is not. But does this conclude the matter?" (p. 948.)

The opinion refers to a number of facts of which the court takes judicial notice, including the size and extent of the Arkansas river; that through its long courses in Kansas both of its banks were meandered by the government surveyors; the act of congress of February 20, 1811, passed for the purpose of enabling the people of the territory of Orleans to form a constitution and state government, which provided that the Mississippi river and the navigable rivers and waters leading into the state should be common highways and forever free to the inhabitants of the state as to other citizens of the United States; also to similar provisions found in the act admitting Louisiana and the act creating the Missouri territory, and to similar declarations in the ordinance for the admission of the Northwest territory. The opinion then proceeds:

"The question as to when a stream once navigable ceases to be so by nonuse or by the accumulation of sand or soil is one on
100 which we have been afforded no light. But considering the character, width and length of the river, the various acts and declarations by congress in reference thereto, and the policy shown thereby with reference to waters which more than one hundred years ago were navigable according to the needs and uses of that time, and which led into the Mississippi, we deem it justifiable to hold, and do hold, that while the stream is not now navigated in fact anywhere in Kansas it has, nevertheless, not ceased to be a highway set apart by national act and declaration for public use in the manner and at the time to be determined upon by the federal government. This being true, the title to the bed is in the state, and islands therein not surveyed or claimed by the government belong also to the state, and under the act of 1907 may be sold as school land." (p. 964.)

If there be any one proposition upon which the courts have agreed "with no variableness, neither shadow of turning," it is that the extent of the title of the owner of lands bordering upon navigable waters depends upon the local law. Whether under a patent from the United States the title extends to the center of the stream or lake or is limited to the margin thereof is everywhere held to be dependent on the law of the state. (*Martin et al. v. Waddell*, 16 Pet. [41 U. S.] 367; *Pollard's Lessee v. Hagan et al.*, 3 How. [44 U. S.] 212, 11 L. Ed. 565; *Weber v. Harbor Commissioners*, 18 Wall [85 U. S.] 57, 21 L. Ed. 798; *Barney v. Keokuk*, 94 U. S. 324; *Packer v. Bird*, 137 U. S. 661; *Hardin v. Jordan*, 140 U. S. 371, 35 L. Ed., 428; *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed., 31; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 56 L. Ed. 570; *Scott v. Lattig*, 227 U. S. 229, 57 L. Ed. 490.)

In *Barney v. Keokuk*, supra, it was said:

"If they (the states) choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." (p. 338.)

In *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 57 L. Ed. 1063, it is said in the opinion:

"The technical title to the beds of the navigable rivers of the United States is either in the states in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law." (Cases cited, p. 60.)

In the recent case of *Kansas v. Colorado*, 206 U. S. 46, the United States itself was a party and rested a claim asserted by Kansas to the ownership of the bed of the Arkansas river. In the opinion Mr. Justice Brewer said:

"But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters." (p. 93.)

A multitude of cases to the same effect might be cited from the courts of the various states. In fact, whether a patent of upland from the United States conveyed the title to the bed of navigable streams is not a federal question within the removal acts. (Gould on Waters, 3d ed., § 40; *Kenyon v. Knipe*, 46 Fed. 309.) Although in a former edition the exact contrary was said to be the law. (Gould on Waters, 2d ed., § 40.)

Our first inquiry, therefore, must be, what is the law of Kansas? In his dissenting opinion in *Hardin v. Jordan*, supra, Mr. Justice Brewer, after stating that "beyond all dispute the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of local law" (p. 402), used this language:

"For a determination of that question the statutes of the state and the decisions of its highest court furnished the best and the final authority." (p. 402.)

We have no hesitation in declaring that the law of Kansas upon this question has been settled not only by statutory authority, but

by previous decisions of this court, notably: *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330, and *Dana v. Hurst*, 86 Kan. 947, 122 Pac. 1041. In *Wood v. Fowler*, supra, the

action was to restrain defendants from cutting and removing ice formed on the surface of the Kansas river within certain described boundaries. It involved the title of the riparian owner, who claimed to own to the center of the stream. It was decided in that case that a riparian owner owns only to the bank and not to the center of the navigable stream. In the opinion Mr. Justice Brewer, after reciting historical facts showing that the Kansas river is a navigable stream, used this language:

"The stream having been meandered, the lines of the surveys are bounded by the bank; the patents from the United States passed title only to the bank; Splitlog, as riparian owner, owned only to the bank. The title to the bed of the stream is in the state." (p. 688.)

We shall have occasion to refer again to this decision upon another branch of the present case.

In *Kregar v. Fogarty*, 78 Kan. 541, 96 Pac. 845, it was said:

"In disposing of public land bordering upon rivers it is not the policy of the government to reserve title to the lands under water, whether the stream be navigable or not. The government parts

with its whole title, leaving the question of boundary, whether the shoreline or the thread of the stream, to be determined by the local law. In case of navigable waters in this state the boundary is at the bank, and the title to the bed of the stream is in the state." (Citing *Wood v. Fowler*, supra, and *Hardin v. Jordan*, 140 U. S. 371.) (p. 545.)

In the briefs counsel for defendants say:

"It is true that the government has not, directly, at any time, made a practice of disposing of the beds of nontidal rivers, where the banks thereof have been meandered in the course of the making of the public surveys; but this fact does not by any means imply lack of power to do so."

It must be conceded that the precise question is one upon which the courts were for a long time undecided. Expressions were found in opinions rendered by the United States supreme court which left the matter in doubt. However, as early as 1856, in the case of *Haight v. The City of Keokuk*, 4 Iowa, 199, the supreme court of Iowa announced the doctrine that the government can not convey the land between high- and low- water mark on the public navigable rivers, citing *Pollard's Lessee v. Hagan et al.*, 3 How. (44 U. S.) 212, and other authorities. In the opinion it was said:

"Although no state may exist at the time of such a grant, as in this case, yet grants and sales made under such circumstances are to be construed as having a view to the future sovereignty which may or will arise, and so as not to impair its rights when arisen," (p. 213.)

One of the first decisions by a state court holding squarely that the United States have no authority to convey the title to the bed of navigable streams within a territory before its admission to the Union was by the supreme court of Oregon in *Hinman v. Warren*, (1877) 6 Ore. 408. Oregon was admitted into the Union February 14, 1859. Long prior thereto, in 1850, congress passed an act known as the "Oregon Donation Act," requiring the lands to be surveyed as in the Northwest Territory; and it made grants or donations of land, according to government surveys, to actual settlers and occupants. The supreme court of the state, in the *Hinman* case, held that a patent from the United States conveyed no land below high-water mark, and that the tide-lands belong to the state of Oregon by virtue of its sovereignty. In the syllabus it was ruled that:

"The United States government has no authority to so dispose of lands within a territory as to make it impossible to admit such territory into the Union upon an equal footing with the other states.

In all matters that touch the sovereignty of the future state,
102 the general government is simply a protector thereof, until such time as the territory becomes a state."

In the first and second editions of *Gould on Waters*, published in 1883 and 1891, respectively, the author used this language:

"In *Hinman v. Warren*, in Oregon, it was held that the United States, while holding the title to the soil of tide waters, can not make a valid conveyance of such soil. There are also dicta to this effect in the case of *Haight v. Keokuk*, in Iowa, but *Hinman v. Warren*

was the first adjudication upon the subject. According to this view, the United States holds purely as trustee for the future State, and is without statutory or constitutional authority to do any act making it impossible to admit the new State upon a footing equal, in all respects, with that of the other States. The decisions of the Supreme Court of the United States were thought to lead to the conclusion reached in *Hinman v. Warren*; but it would seem that there is no very direct expression of such a view, in the opinions of that court." (§40.)

It is significant that in the third edition of *Gould on Waters*, published in 1900, the author omitted the foregoing language from the text; and section 40 was rewritten to conform to the then recent decision of the supreme court of the United States in *Shively v. Bowlby*, 152 U. S. 1. That case, decided in 1894, cites with approval *Hinman v. Warren* as stating the Oregon law. Since the case of *Shively v. Bowlby*, *supra*, the question can no longer be considered doubtful. In that opinion Mr. Justice Gray reviewed the decisions in this country, and referred to the origin of the law of England from the time of Lord Hale, where it was settled that the title to tide-lands or of arms of the sea below ordinary high-water mark is in the King, except where rights have been acquired by express grant or by prescription or usage. The doctrine was declared to be well settled here as in England that a grant from the sovereign of land bounded by navigable tide-water passes no title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention (citing Lord Hale in *Hargrave's Law Tracts* 17, 18, 27; *United States v. Pacheco*, 2 Wall. [69 U. S.] 587.) *Martin et al. v. Waddell*, (1842) 16 Pet. (41 U. S.) 367, is cited as the leading case in this country, and after stating the different rules which obtain in the original states with respect to the title to lands covered by navigable streams or by tide-waters, the opinion proceeds:

"The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.

"IV. The new States admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands below the high water mark, within their respective jurisdictions." (p. 26.)

"VIII. Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true." (p. 47.)

"We can not doubt, therefore, that Congress has the power to make

grants of lands below high water mark of navigable waters in any territory of the United States, *whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.*

103 "IX. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek." (p 48) (The italics ours.)

The reasons are stated in another part of the opinion in the following language:

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community." (p. 49.)

The court decides that a donation claim under the act did not of its own force have the effect of passing any title in lands below high-water mark.

It will be observed that the court limits the power of congress to make grants of lands below high-water mark of navigable rivers in a territory to instances where it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the purposes of commerce, or to carry out other public purposes appropriate to the objects for which the United States hold the territory. The contention of defendants that congress has the power to grant to settlers the title to the bed of nontidal navigable streams within a territory is not sustained by any express declaration of the United States supreme court to which our attention has been called; and certainly no such inference can be drawn from anything that is said in the exhaustive opinion in *Shively v. Bowlby*, *supra*.

Moreover, many of the decisions to which we have already referred, and numerous others which might be cited, hold that in the case of all meandered streams no part of the soil under them is included

within the original survey or passes by virtue of the patent. (*Dana v. Hurst*, 86 Kan. 947, 122 Pac. 1041; *Kregar v. Fogarty*, 78 Kan. 541, 96 Pac. 845.) In *Mayor, &c., of Mobile v. Eslava*, 9 Porter (Ala.), 577, it was said:

"By the acts of Congress regulating the survey and disposal of the public lands, the federal government has renounced the title to the navigable waters, and the soil covered by them." (p. 604.)

In *Hardin v. Jordan*, *supra*, the court said:

"We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie. The next question for consideration, therefore, is, what is the law of Illinois with regard to such grants?" (p. 384.)

The same court, in the case of *Hardin v. Shedd*, 190 U. S. 508, used this language:

"When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union." (p. 519.)

"The rule that a grant is to be construed most strongly against the grantor does not apply to public grants. The government
104 being but a trustee for the public, its grants are to be construed strictly. Grants of land by the United States, by patent, have relation to the survey, plats, and field notes." (*McManus v. Carmichael*, 3 Iowa, 1, syl.)

"The United States, upon acquiring a Territory, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, take the title and the dominion of lands below high water mark of tide waters for the benefit of the whole people, and in trust for the future States to be created out of the Territory." (*Shively v. Bowlby*, 152 U. S. 1, syl. ¶ 6.)

By the policy of the state of Wisconsin, declared in numerous judicial decisions, there is a qualified title to submerged lands of rivers navigable in fact conceded to shore owners, but this qualified title is not permitted to displace or materially affect public rights or the title to lands under the streams, which are held to be in the state. In *Illinois Steel Co. v. Bilot and Wife*, 109 Wis. 418, 85 N. W. 402, 83 Am. St. Rep. 905, decided in 1901, it was held that the title to lands under lakes, ponds and navigable rivers of the state was never in the United States, except in trust for public purposes; that a patent from the United States, covering such lands, whether made before the state was admitted into the Union or thereafter, conveys no title.

In the opinion it was said:

"The United States never had title, in the Northwest Territory out of which this state was carved, to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust

in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth. Whatever concession the state may make without violating the essentials of the trust, it has been held, can properly be made to riparian proprietors." (p. 426.)

Among the cases cited are: *Village of Pewaukee v. Savoy* and another, 103 Wis. 271, 74 Am. St. Rep. 859, 79 N. W. 436; *Barney v. Keokuk*, 94 U. S. 324; *Railroad Company v. Schurmeir*, 7 Wall. (74 U. S.) 272.

Some of the same questions were passed upon in the recent case of *United States v. Mackey*, in the district court of the United States for the eastern district of Oklahoma, — Fed. —. The question involved was the validity of oil and gas leases in the bed of the Arkansas river. There were three rival claimants. The United States sought to maintain the right of the Creek Indians to the oil underlying the bed of the river. The Creek Indians are one of the five civilized tribes holding permanent titles to their lands by treaty, and after the tribal relations were dissolved the lands were allotted in severalty to the members of the tribe. Avery and the Gipsy Oil Company claimed under leases from the owner of the riparian lands, Avery's title being founded upon a lease to the lands in the bed of the stream, and that of the oil company on the claim that its lease covered all the riparian lands, and therefore the bed of the stream, on the theory that the title of the riparian owners extended to the middle thread of the stream. The Pollard Hagan Oil Company claimed under a lease from the state of Oklahoma on the theory that the state acceded to the ownership of the bed of the river upon her admission to the Union, subsequent to the making of the lease. The court upheld the Oklahoma title on the ground that the Arkansas is navigable, and that the title of the United States to the river beds was in trust for the state of Oklahoma; that the Indians were mere occupants of the lands, and that the state alone could dispose of the title to the bed of the streams. In the opinion the court approves and follows the Kansas case of *Dana v. Hurst*, supra, and starts with the proposition that the Arkansas river is a navigable stream; that the grant to the Creek Nation by the patent of August 11, 1852, did not convey to that nation the same title and interest in the bed of the river as it acquired by the patent to the uplands. The
 105 opinion contains an exhaustive review of the decisions, many of which we have already cited.

Since the argument we have been furnished with a copy of a decision by the supreme court of Oklahoma which was handed down March 10, 1914. The case is *The State of Oklahoma v. Larry Nolegs, the Jim Crow Oil Co., et al.* Portions of the syllabus read as follows

"1. The ownership of the navigable waters and the soil under them in all the territory embraced in the Louisiana Purchase was held in trust by the Federal Government and as each of the states were created, the same, within the boundaries of such state, passed to it and the absolute right to such navigable waters and the soil there-

under is in the state, subject to the public rights and the paramount power of Congress over navigation.

"2. If a river is in fact navigable and in fact used for purposes of commerce, the title to the waters thereof and the bed thereunder is held by the Federal Government and when a Territory containing such navigable river becomes a state, the title thereto vests in the state, regardless of subsequent navigation or navigability and the fact that a riparian owner obtains title to the land adjoining such stream prior to statehood does not divest the state of such title.

"6. Where a government patent to land describes the same by lots and refers to the official plat of the survey thereof and such plat shows that the land conveyed is bounded by a navigable river, the title extends no further than the edge of the stream and does not include an island, though the channel between that and the main land may not be navigable."

The foregoing principles of law are supported in a well-considered opinion by the Oklahoma court which follows and approves the Kansas case of *Dana v. Hurst*, supra, and *United States v. Mackey*, supra, and refers to numerous acts of congress, public records and documents of the several departments at Washington recognizing the navigability of the Arkansas river. As will be observed, many of the questions passed upon are directly in point here.

But defendants assert a prior claim to the bed of the Kansas river adjoining their riparian lands by virtue of a patent issued to Silas Armstrong, a Wyandotte Indian. Again they are met and foreclosed by the decision in *Wood v. Fowler*, supra. In that case plaintiff claimed under a patent to Matthias Splitlog, a Wyandotte Indian, whose title was in all respects the same as that of Silas Armstrong to the lands in this case. But the court said:

"The stream having been meandered, the lines of the surveys are bounded by the bank; the patents from the United States passed title only to the bank; Splitlog, as riparian owner, owned only to the bank. The title to the bed of the stream is in the state." (p. 688.)

In the briefs defendants say that this language was not necessary to the decision; but the court at the time deemed the question necessary and controlling and saw fit to rest its decision on that ground, so that the language can not be regarded as dictum. The contention of defendants that the common law in all its strictness was in force in the territory of Kansas when the Indian patentees acquired title, and that by force of that law the original riparian owners took to the center thread of the stream, is also disposed of by what was said in *Wood v. Fowler*, as follows:

"It is true a distinction was recognized in England, and that streams were considered navigable only in so far as they partook of the sea, and to the extent that their waters were affected by the ebb and flow of the tide, and only so far was the title of the riparian owner limited to the bank; above such point, even although the stream was large enough to be used, and in fact was used, for purposes of navigation, the riparian owner owned the soil ad

medium filum aquæ. * * * The same doctrine of riparian ownership to the center of the stream in all rivers unaffected by the ebb and flow of the tide, is recognized in some states of the Union; but the better and more generally accepted rule in this country is, to apply the term 'navigable' to all the streams which are in fact navigable; and in such case to limit the title of the
 106 riparian owner to the bank of the stream. Especially is this true in the states where the lands have been surveyed and patented under the federal law. See the following authorities: *Rld. Co. v. Schurmeir*, 7 Wall. 272; *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Tombden v. Rld. Co.*, 32 Iowa, 106; *Flannigan v. City of Philadelphia*, 42 Pa. St. 219; *Bridge Co. v. Kirke*, 46 Pa. St. 112; *People v. Tibbets*, 19 N. Y. 523; *People v. Loomis*, 33 N. Y. 461." (p. 689.)

The defendants, however, say that the extent to which the common law became a rule of property in Kansas is to be determined, not from language used by way of argument in *Wood v. Fowler*, but by reference to the act of the territorial legislature of 1855 (Statutes of Kansas Territory, 1855, ch. 96), which declared that the common law of England and all statutes prior to 4 James I. not local to that kingdom, and of a general nature, should be the rule of action and decision in the territory (*Sattig v. Small*, 1 Kan. 170, 175). Substantially the same provision was re-enacted in 1859. In 1868 the language was changed to read:

"The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the general statutes of this state." (Gen. Stat. 1868, ch. 119, §3.)

It is worth while to inquire by what process of reasoning it can be asserted that Kansas was deprived of her right to enter the Union upon an equality with the other states? Time and again the supreme court of the United States has declared that each of the new states is entitled to be admitted into the Union on an equal footing with the original states.

"By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States, respectively. Secondly. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. * * * To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding." (*Pollard's Lessee v. Hagan et al.*, 3 How. [44 U. S.] 212, 230, 229, 11 L. Ed. 565, 573; *Martin et al. v. Waddell*, 16 Pet. [41 U. S.] 367; *Weber v. Harbor Commissioners*, 18 Wall. [85 U. S.] 57, 71, 21 L. Ed. 798; *Knight v. U. S. Land Association*, 142 U. S. 161, 35 L. Ed. 974; *Shively v. Bowlby*, supra; *Withers v. Buckley et al.*, 20 How. [61 U. S.] 84.)

The Kansas and the Arkansas rivers when the territorial act of 1855 was passed were navigable in fact, and were so recognized by

congress in its surveys of the public lands. Ordinarily the first lands to be taken up by settlers are those on the banks of the streams. The great struggle for the admission of Kansas might have been prolonged until all but a few tracts of riparian lands along the Kansas river from its mouth to Junction City had been settled upon. Had such been the situation, and if defendants' contention is sound, Kansas would have entered the Union stripped of the valuable right of ownership in and control over the bed of the Kansas river, or what is just as inconceivable would have held the title only to those fragmentary portions of the bed of the stream that adjoined the lands not settled upon. Moreover, this situation would have resulted, not because the Kansas river was not a navigable and public stream in fact, but because the common law of England as declared by Lord Hale and collected by him from decisions in the Year Books made the ebb and flow of the tide the test of navigability.

The defendants rely with much confidence upon the following language from the decision of Judge Compbell of the federal court of Oklahoma in *United States v. Mackey*, *supra*:

"If, therefore, we are to apply the strict rule of the common law as it existed in England at the time this country was colonized, the rights of the owners of the upland bordering upon this stream, so far as ownership of the soil is concerned, must be considered as extending to the middle thread of the stream, to the exclusion of the state, subject only to the public right of navigation."

No one will dispute the legal proposition stated. It merely asserts that under the strict rules of the common law as it existed in England, no river or arm of the sea was in law navigable above the point where it was affected by the tide, although it may have been navigable in fact above such point, and the title of the riparian owner above the ebb and flow of the tide extended to the middle thread of the stream, while the title to the bed of that portion of the stream affected by the tide was in the crown. Of course, if that rule of the common law were applied to Kansas streams the defendants would be correct in their contention. Oklahoma's adopting statute is worded as our amended statute of 1868, and Judge Campbell may have been of the opinion that if the Oklahoma statute contained language as broad as our statute of 1855, the riparian proprietor of lands bordering on the Arkansas river would have acquired title to the middle thread of the stream. But we do not so construe the effect of the territorial acts by which Kansas adopted the rules of the common law.

We have always supposed that the first settlers in Kansas, those who came even before the Kansas-Nebraska act, brought with them the common law of England, that is so much of it as was not local to England and was applicable to the circumstances and conditions of the territory, and that the common law to that extent was already a part of the law of the territory when the adoption act of 1855 was passed.

How the common law came to Kansas is told in a comprehensive sketch of the subject in *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571.

In the opinion Mr. Justice Burch reviews the history of the formation of the Louisiana territory, and refers to the acts of congress, the legislation of the several states and territories to which Kansas has at different times in her history belonged, and cites the public documents and decided cases bearing upon the question. Speaking of the principles of the common law to which the immigrants who came from the Southern states "were inured," the opinion says:

"It was likewise notoriously the heritage of the men who came from the North to Kansas to aid in establishing its law" (p. 224).

The opinion also quotes from the message of Governor Reeder of July 3, 1855, to the first territorial legislature as follows:

"It appears that the laws of the United States not inapplicable to our locality—the laws of the territory of Indiana made between the 26th of March, 1804, and the 3d of March, 1805, enacted for the district of Louisiana—the laws of the territory of Louisiana—the laws of the territory of Missouri—the common law, and the law of the province of Louisiana at the time of the cession, except so far as the latter have superseded the former, still remain in force in the territory of Kansas. As the common law to a considerable extent was adopted for the territory by congress as late as 1812, and by the Missouri legislature as late as 1816, * * * it has without doubt superseded and supplied a great amount of the law previously existing." (pp. 220, 221.)

Statutes solemnly enacted are often said to be merely declaratory of the common law; that is to say, the law declared by the statute was already in existence; and the courts, without the sanction of the statute, would in a proper case have enforced it. Moreover, the act of 1855 expressly excepts from its operation those rules of the common law of England which were local to that kingdom and not of a general nature. What rule could be more local to Great Britain and less general in nature than one which could only apply to the peculiar natural conditions existing there, the absence of
108 navigable streams that were unaffected by the ebb and flow of the tide? What rule could be imagined more unsuited to the great Mississippi and its navigable tributaries, not only rendered navigable by the laws of nature but the free navigation thereof consecrated and guaranteed by public treaties and acts of congress?

Speaking of the rights of Alabama, the supreme court said in the opinion in the case of Pollard's Lessee v. Hagan et al., supra:

"But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions." (p. 229).

In *Christholm v. Georgia*, 2 Dallas (2 U. S.), 419, 1 L. Ed. 440, 447, Justice Iredell used this language with respect to the common law, which is so often quoted:

"I know of none such, which can affect this case, but those derived from what is properly termed 'the common law,' a law which I presume is the ground-work of the laws in every State in the Union, and which I consider, *so far as it is applicable to the peculiar circumstances of the country*, and where no special act of Legislation controls it, to be in force in each State, as it existed in England

(unaltered by any statute) at the time of the first settlement of the country." (p. 435).

The italics are ours and emphasize the qualifying language to which we wish especially to direct attention.

There has always been, it is true, a contrariety of opinion in the courts of the different states upon this question. Those of the original states with rivers and waters affected by the ebb and flow of the tide adopted the common law test of navigability. But this was repudiated by some of the original states as wholly inapplicable to great rivers and streams actually navigable and wholly unaffected by the tide. The supreme court of Pennsylvania as early as 1810 decided that the doctrine of Lord Hale as to navigable rivers is not applicable to the larger rivers of Pennsylvania, such as the Ohio, Delaware, Susquehanna and Allegheny. Chief Justice Tilghman, who tried the case on the circuit, said in his opinion:

"But the common law principle concerning rivers, even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide, and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England, no such law would ever have been applied to it. Their streams, in which the tide does not ebb and flow, are small." (Carson v. Blazer, 2 Binn, 475, 477.)

His ruling was affirmed in the supreme court in an opinion which, after referring to the act of the assembly of 1877, declaring that the common law of England shall be binding on the inhabitants of the state, used this language:

"But the uniform idea has ever been that only such parts of the common law as were applicable to our local situation have been received in this government. The principle is self-evident. The adoption of a different rule would, in the language of Sir Dudley Ryder, resemble the unskillful physician, who prescribes the same remedy to every species of disease. The qualities of fresh or salt water can not amongst us determine whether a river shall be deemed navigable or not. Neither can the flux or reflux of the tides ascertain its character." (p. 484.)

(To the same effect is *Shrunk v. The President, &c., of the Schuylkill Navigation Company*, 14 Serg. & Rawl. 71.)

One of the first to adopt the common sense rule was the supreme court of North Carolina in the case of *Wilson v. Forbes*, 2 Dev. (13 N. Car.) 30, decided in 1828. In the opinion, Henderson, Judge, said:

"It is clear that by the rule adopted in England, navigable waters are distinguished from others, by the ebbing and flowing of the tides—but this rule is entirely inapplicable to our situation, arising both from the great length of our rivers, extending far into the interior, and the sand-bars and other obstructions at their mouths. By that rule, Albemarle and Pamlico sounds, 109 sounds, which are inland seas, would not be deemed navigable waters, and would be the subject of private property." (p. 34.)

The great case of *McManus v. Carmichael*, 3 Iowa, 1, is cited with

approval in our own case of *Wood v. Fowler*, supra. It is a storehouse of reason and authority to which we are much indebted. Judge Dillon was one of the counsel who contended that the absurd rules of the common law could not be made the test of the navigability of a great river like the Mississippi. In the briefs he said:

"If, * * * this river is navigable, then it is so in spite of the common law; or, more correctly speaking, it is navigable, because the common law, not having any applicability to this river, has nothing to do—I repeat it, the common law has nothing to do—with the question as to whether it is navigable or not navigable." (p. 25.)

And he was speaking of navigability in law as affecting riparian rights. In the opinion Mr. Justice Woodward used this language:

"And if we, like the people of these states, generally, have brought the common law with us; then, too, we like them, have brought such parts of it as are adapted to our institutions and circumstances; and we ask with confidence, whether the rules and tests which are applicable enough to the rivulets of England, shall be taken to measure those waters, whose flow is through the climates and zones of the earth?" (p. 31.)

Reviewing the decided cases he said:

"In the most of those from the northeastern states, the subject is discussed very little; but they simply assume the common law rule as the one to decide by, and look no farther." (p. 33.)

He quotes from the opinion of the judges in the case of *The Canal Commissioners v. The People*, 5 Wend. 423, where Chancellor Walworth said:

"The principle itself does not appear to be sufficiently broad to embrace our large fresh water lakes, or inland seas, which are wholly unprovided for by the common law of England. * * * It is not necessary to express an opinion whether this principle can be properly applied to some parts of those streams which are navigable from the sea by large ships and vessels, far above the influence of the tides, as that question can never arise in this state. We have no such rivers." (pp. 447, 448.)

Commenting upon this language, Justice Woodward said:

"Surely, such an expression leaves us, who have such rivers, free to discuss the question anew, and without feeling constrained by those decisions." (p. 41.)

We quote the following extracts from the syllabus of the Iowa case:

"Although the ebb and flow of the tide was, at common law, the most usual test of navigability, it was not necessarily, the only one.

"But however this may be, that test is not applicable to the Mississippi river.

"The term navigable embraces within itself, not merely the idea that the waters could be navigated, but also the idea of publicity, so that saying waters are public is equivalent, in legal sense, to saying that they are navigable.

"It is navigability in fact which forms the foundation for

navigability in law, and from the fact follows the appropriation to public use, and hence its publicity and legal navigability.

"The real test of navigability in this country is ascertained by use, or by public act or declaration.

"The acts and declarations of the United States declare and constitute the Mississippi river a public highway, in the highest and broadest intendment possible."

The leading western cases to the contrary are *Morgan and Harrison v. Reading*, 3 Sm. & M. (Miss.) 366, decided in 1844, and *Middleton v. Pritchard et al.*, 3 Scam. (4 Ill.) 510. So far as we have examined they are the only cases which have applied the strict rule of the common law to the Mississippi river, and which hold

that it is not in law a navigable stream. The conflict of
110 opinion in the various states upon this vexed question has created some anomalous conditions. Because of the adherence of the Illinois courts to the strict rules of the common law as to property rights, the owner of lands in northern Illinois bordering on the east bank of the Mississippi owns the bed of the river to the middle thread, where his title is met by that of the sovereign state of Iowa.

In *Barney v. Keokuk*, supra, Justice Bradley said:

"In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject. The exhaustive examination of this question by the Supreme Court of Iowa in 1856, in the case of *McManus v. Carmichael*, 3 Iowa, 1, really leaves nothing to be said." (p. 338.)

The fact must not be lost sight of that the supreme court of the United States repudiated the absurd definition of the common law as long ago as 1851, in the case of *The Genesee Chief*, 12 How. (53 U. S.) 443. The opinion, which was delivered by Chief Justice Taney, has long been recognized as one of the monuments of the law. The court was confronted by a condition. In its earlier cases, notably *The Thomas Jefferson*, 10 Wheat. (23 U. S.) 428, the court had decided that the admiralty jurisdiction of congress was limited to tidewaters. In 1845 congress passed an act, the validity of which was regarded as doubtful, and by which it was sought to extend the admiralty jurisdiction to the great navigable streams and inland lakes. The court freely recognized its embarrassment because of its former rulings, and in the opinion regretted that the proposition had not been presented at an earlier time in the history of the country. The court, however, expressed itself as convinced that it would not do to follow an erroneous decision into which it fell "when the great importance of the question as it now presents itself could not be foreseen." (p. 456.)

In the opinion it was said:

"It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. * * * The lakes and the waters connecting them are undoubtedly public waters;

and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." (p. 457.)

The act of congress was held constitutional. We must once more refer to the language of Mr. Justice Bradley in *Barney v. Keokuk* supra:

"And since this court, in the case of *The Genesee Chief*, 12 id. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters." (p. 338.)

We have already quoted from opinions of the supreme court of Pennsylvania. The same court in a later case has held that the Monongahela is a navigable stream, and that its soil up to low-water mark, and the river itself, are the property of the commonwealth. In *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112, the absurdity of the common-law test of navigability is aptly stated in the following language:

"We are aware that by the common law of England such streams as the Mississippi, the Missouri, the rivers Amazon and Plate, the Rhine, the Danube, the Po, the Nile, the Euphrates, the Ganges and the Indus, were not navigable rivers, but were the subject of private property, whilst an insignificant creek in a small island was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbed and flowed up the whole of its petty course. The Roman law, which has pervaded Continental Europe,

and which took its rise in a country where there was a tide-
 111 less sea, recognized all rivers as navigable which were really so, and this common-sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth." (p. 120.)

The doctrine of the Iowa courts repudiating the tidal test of navigability and declaring that a stream is navigable in law which is navigable in fact, and which has been declared to be a public stream by the acts of congress and recognized as such by government surveys of the public lands, has been expressly approved by the supreme court of the United States in the case of *Packer v. Bird*, 137 U. S. 661, 34 S. L. Ed. 819, which involved the title to the bed of the Sacramento river in California. In the opinion Mr. Justice Field, after referring to the states which have adopted the common-law rule to its fullest extent and to those which like Pennsylvania and Iowa have repudiated it, used this language:

"The legislation of Congress for the survey of the public lands recognizes the general rule as to the public interest in waters of navigable streams without reference to the existence or absence of the tide in them." (p. 672.)

In the opinion it was said:

"A different test must, therefore, be sought to determine the navigability of our rivers, *with the consequent rights both to the*

public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact. * * * The same reasons, therefore, exist in this country for the *exclusion of the right of private ownership over the soil under navigable waters* when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, *and consequently to the exclusion of private ownership, either of the waters or the soils under them.*" (Italics ours.) (p. 667.)

In those states where the common-law test as to navigability has been followed the courts recognize the right of the state to keep the stream open for the public use of navigation, and they argue that the public right is in no way impaired by the fact that the bed of the stream is owned absolutely by the riparian owners. Thus, in *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435, it was said:

"The public authorities can regulate water highways as well as land highways, although the soil of neither belongs to the state." (p. 32.)

The same argument is employed by Mr. Farnham in his vigorous opposition to any relaxation to the strict rule of the common law. (1 Farnham, *Waters and Water Rights*, p. 253.)

It is worthy of note that some of the courts which have felt themselves bound by the common-law test of navigability have refused to apply this doctrine in its entirety, but on the contrary have reserved to themselves the right to modify that ancient rule whenever in their judgment it has been found inapplicable to the situation and conditions of the people. Thus, in the recent case of *Fulton L., H. & P. Co. v. State of N. Y.*, (1911) 200 N. Y. 400, 94 N. E. 199, 37 L. R. A., n. s., 307, the New York court of appeals, while declaring that in adopting the common law of England the people of that state took over such of its rules as were applicable to and consistent with their condition and circumstances, laid down the doctrine that the title to a navigable stream above tide-water is in the riparian owners, except where it constitutes a territorial boundary. Now the common law of England was a system of rules and precedents designed for the government of the people of an island. It knew nothing of streams as boundaries between states. The decisions in New York and Iowa are not so inconsistent after all, since it appears that the courts in each state differ merely in determining what rule is best suited to the wants and conditions of the people. Illinois, as we have seen, has applied the doctrine even to the Mississippi river, which is a state boundary.

In addition to Pennsylvania, North Carolina and Iowa, the following states have refused to be bound by the common-law test of navigable waters: Missouri (*Benson v. Morrow et al.*, 61 Mo. 347;

Cooley v. Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300); South Carolina (Cates v. Wadlington, 1 McCord, 580); Tennessee (Elder v. Burrus, 6 Hemp. [25 Tenn.] 358); Alabama (The Mayor, &c. of Mobile, v. Eslava, 9 Porter, 477; affirmed in 16 Pet. [41 U. S.] 234); Michigan (La Plaisance Bay Harbor Co. v. City of Monroe, 1 Walker, Ch. 155).

After all, in every case the substantial question is this, Is the stream navigable or not? Under the common law of England the mode of ascertaining the fact may have been uniform, and the fact that the tide ebbcd and flowed in the stream may always have been taken there as evidence of the fact. Nevertheless, it is the fact of navigability and not the mode of proof upon which the rights of riparian owners should be made to depend.

We have considered the question at length because of its importance and the different view which prevails in some of the states, and for the further reason that it involves what we regard as the most meritorious of the claims urged by the defendants. We adopt the Iowa doctrine, and hold that by the declarations of the United States in the several acts of congress relating to the survey and disposal of the public lands, and by other legislation relating to the western country out of which Kansas territory was carved (and which are referred to elsewhere in this opinion and in *Wood v. Fowler*, supra, and in *Dana v. Hurst*, supra), the Mississippi river and its navigable tributaries were constituted public highways, and recognized as navigable streams in the fullest and broadest sense. The supreme court of the United States having repudiated the common-law definition of navigable waters in 1851, and the same test of navigability having been repudiated by many of the states in the Union before the act of the territorial legislature of 1855 adopting the common law was enacted, we hold that the ancient rule of the common law defining navigable waters was never a part of the common law of Kansas; that Kansas entered the Union upon an equal footing with the other states; that upon her admission into the Union absolute property in and dominion and sovereignty over the soils under the navigable and public streams within its limits passed to the state, in trust for all the people, subject to the superior rights of the federal government with respect to navigation.

Nor do we think that anything said in *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571, holds to the contrary. The question there involved the rights of a riparian owner to the use of water for irrigation purposes from Rose creek, a stream five miles long. It is true, as stated in the opinion, that "the common-law rules in relation to riparian rights became the law of Kansas for every stream within its borders." (p. 229.) But the common-law test of navigability never became the law of Kansas. The court in *Clark v. Allaman* was not attempting to define navigable streams, nor was it the intention to declare the law as to the ownership of the bed of meandered navigable streams to be different from what had already been held in *Wood v. Fowler*, 26 Kan. 682. The defendants possess all the rights of riparian owners under the common law as that law is applicable to Kansas. What we decide is that they never acquired any property interest in the

bed of the Kansas river adjoining their lands. It is unnecessary to define their riparian rights under the common law, but one of them is the right of flowage, and as was held in *City of Emporia v. Soden*, 25 Kan. 588, 34 Am. Rep. 130, 60 Am. Dec. 453, the state could not, if it would, deprive them of such rights without compensation. (See, also, *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190.)

We are unable to discover any reason why the fact that the sand is mingled with the flowing water of the stream and comes originally from the upper reaches of the Kansas river affects the matter, or how that fact could deprive the state, which is the exclusive owner of the bed, of the right to dispose of any surplus water flowing over it or any natural product found therein, so long as the state does nothing either to violate its duty to hold the title as trustee for the benefit of the people nor to interfere with the superior rights of congress to control navigation. Because the title to the soil is in the state it was said in *Wood v. Fowler*, 26 Kan. 682:

"The riparian proprietor would have no more title to the ice than he would to the fish. It simply is this, that his land joins the land of the state. The fact that it so joins, gives him no title to that land, or to anything formed or grown upon it, any more than it does to anything formed or grown or found upon the land of any individual neighbor." (p. 690.)

Moreover, that sands accumulate upon the bed of the river we know to be a fact. At times of low water the bed is made up largely of bars of sand which are started in motion when the stream rises; and although it is customary in removing the sand to operate the dredges and shovels in running water, the sand taken forms a part of the bed of the stream.

In *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, it was said:

"Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." (p. 69.)

In that case also it was said that there was nothing objectionable in permitting the state to let out the use of the water to private parties and thus reimburse itself for the expenses incurred in the erection of a public dam.

The argument that because the sand is in constant motion it falls within the principle of *feræ naturæ*, and that the defendants cannot be deprived of the valuable right of an individual to reduce to his possession wild animals or things of that nature does not impress us as sound. We have examined the seaweed cases cited, and do not think they support the claim of the defendants. They merely hold that seaweed cast by the tide and waves upon the land of a riparian proprietor becomes his property just as wreckage cast upon his lands belongs to him. (*Church v. Meeker*, 34 Conn. 421.) Many of the cases are controlled by statutes conferring certain rights upon the owners of riparian lands adjoining tide-water, such as the case cited in 2 Allen (84 Mass.) 549 (*Anthony v. Gifford*). The opinion

expressly declares that these marine products do not become the property of the riparian proprietor until they are cast upon or attached to the land or shore. There is nothing in chapter 259 which seeks to deprive the defendants of the right to any sand cast upon their lands.

The defendants' claim by prescription cannot be sustained. There is some conflict in the authorities as to whether a right may be obtained by prescription against the public, especially in regard to rights in property dedicated to public use, such as streets and highways. Some hold that rights of this character may be acquired, and others that they cannot. In Pennsylvania it is settled that public rights are not destroyed by long-continued encroachments or permissive trespasses. (*Kittaning Academy v. Brown*, 41 Pa. St. 269. See, also, *Commonwealth v. Moorehead*, 118 Pa. St. 344, 12 Atl. 424, 4 Am. St. Rep. 499). In *Town of Clinton v. Bacon*, 56 Conn. 508, 16 Atl. 548, it was held that the uninterrupted and undisputed possession by defendant of a natural oyster bed for 114 thirty years had not given him a title by adverse possession, the title being in the state, against which there could be no title gained by such possession. Moreover, title by prescription arises by a presumption from long-continued use of an incorporeal hereditament of a previous grant which has been lost. (3 Cruise, 467.) Therefore nothing can be prescribed, for that cannot be the subject of a grant. (*Luttrel's Case*, 4 Coke's Rep. 84b.) To the same effect see 22 A. & E. Encycl. of L. 1187, where it is stated that the doctrine of prescription is applicable only to rights which may be granted, and that a grant will not be presumed where it could not lawfully have been made. (*Hill v. Lord*, 48 Maine, 83, 98.) In *Sollers v. Sollers*, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404, it is held that title to oyster beds belonging to the state cannot be acquired by prescription.

"Property so held belongs to the people in virtue of their sovereign rights, and of it they cannot be deprived save by their own appointment as expressed in the constitution. Legislatures cannot imperil such property. Statutes may prescribe for its regulation, but not for its loss by the public and its acquisition by individuals by prescription or otherwise." (Note, 76 Am. St. Rep. 488; and to the same effect see *Burbank et al. v. Fay et al.*, 65 N. Y. 57, and *Fulton L., H. & P. Co. v. State of N. Y.*, 200 N. Y. 400, 94 N. E. 199.)

We hold, therefore, that no title to the river could be obtained by prescription. The defendants' use of the waters of the stream, however long continued, and whether adverse or by permission, could not impair the rights of the state.

One of the principal contentions of the defendants is that the state has no proprietary interest in the bed of the streams or the natural products of the waters which it can sell and dispose of. In other words, that if it has the title at all as against these defendants, it holds the title in trust for the benefit of the whole people; and they ask the question: "Can the state sell the bed of a meandered stream, such sale not being for any other purpose than the enrichment of its general treasury?" Now the state has not undertaken to sell any

portion of the bed of the streams, and we have not even before us the question as to the power of the state to grant an exclusive right to an individual or corporation to take these sands from the streams. The statute itself, section 2, expressly provides that no contract shall be entered into granting any exclusive privilege under the act. The defendants rely very much upon the decision of the supreme Court of Wisconsin in *Rossmiller v. State*, 114 Wis. 169, 89 N. W. 839, 58 L. R. A. 93, 91 Am. St. Rep. 910. The state of Wisconsin enacted a statute making it unlawful to cut ice from any meandered lake in the state for shipment out of the state unless upon a license obtained from the secretary of state and the payment of a royalty to the state of ten cents per ton. The supreme court held the law unconstitutional on the ground that the right to take ice and to the use of any waters of the public streams and lakes was for the individual enjoyment of all, without restraint other than by reasonable police regulations designed to preserve their use to the whole people, and that the state, while holding the title in trust, has no such proprietary interest in the bed of the streams or the waters over them as it would have a right to sell or dispose of. The state is regarded as a mere trustee for the whole people. We have examined the case with interest, but cannot regard it as persuasive upon the question.

It is a well-known fact, of which the court requires no proof, that for commercial purposes the sand of the Kansas river, known everywhere as Kaw river sand, has long been considered by builders and architects to be unsurpassed on account of its sharpness and by reason of other natural properties. It is probably true that no other building sand in the country is shipped to places so distant as the sand from the Kansas river. Only a limited portion of
 115 the people of the state can gain access to the stream and exercise the natural right of taking this valuable natural product from the stream itself. In Kansas all the legislative power that the people possess is vested in the legislature; and the legislature in its wisdom may have believed that the benefit of the whole people and their rights to enjoy this natural product could best be conserved by imposing a royalty upon the taking of sand from the river for commercial purposes, rather than to permit sand companies like the defendants to have unlimited rights therein. The court is well aware of the fact that the state of Oklahoma is leasing for royalties the oil beds beneath the Arkansas river (*United States v. Mackey*, *Supra*); and that in many of the states the right to prospect and obtain the oil and other mineral products beneath the bed of the public rivers is a valuable one. It is stated in the brief of the attorney-general that the states of Wisconsin, Minnesota and Michigan receive enormous revenues from the sale of iron and copper ore taken from the beds of the navigable lakes of those states. We have not examined the statutes or decisions for the purpose of inquiring into the matter, but can see no reason why such rights might not be exercised by the states. The state is the absolute owner of the beds of the streams. It holds the title in trust for all the people and subject to the right of the federal government with respect to navigation. It is not our province to consider the wisdom or expediency of the law passed by the legislature, but we think it is within the power of the state to

conserve the use of the products of these streams for the benefit of all the people by exacting a royalty for the benefit of the state. The state owns the sand and recognizes the right of every person to take freely what he needs for his own use, but requires those who engage in the business for profit to pay a royalty for the benefit of all the people. In *Sanborn v. People's Ice Co.*, 82 Minn. 43, 44, 84 N. W. 641, it was held that while the taking of ice from public waters was one of common right, it was a right only for personal use, and did not extend to an ice company which was cutting and removing ice for shipment and sale in distant markets for commercial purposes.

In the case of *State v. Pacific Guano Co.*, 22 S. Car. 50, the supreme court of South Carolina upheld the power of the state, holding the title to the beds of tidal waters in trust for all the people, to dispose of phosphate beds as the legislature might deem best for her citizens; and a statute by which the state granted rights to different companies to mine in these beds, imposing penalties on those who undertake to do so without such license, was held valid. A similar case was that of *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550. The case involved the validity of an act of the legislature granting exclusive rights in a corporation to mine in the beds of the Coosaw river, and to remove phosphate rock and deposits. The power of the state to exact royalties for the exercise of such privileges was not disputed.

The defendants, not having shown any title or right to the bed of the streams, are not in a position to object to the manner in which the state seeks to use and dispose of its rights therein. In *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, it was held that inasmuch as the defendant had no property right in the river which has been "taken," it was not interested in the question of the power of the government to sell the surplus water.

It is suggested in the briefs of the attorney-general that we might sustain the law as an exercise by the legislature of its power of regulation, but we do not care to rest the decision upon grounds which would require the court to disregard facts of which it takes notice (*The State v. Kelly*, 71 Kan. 811, 81 Pac. 450) concerning the circumstances and conditions existing at the time the act was passed.

All persons well informed with the history of the discussion
116 at the time know that the principal object sought to be accomplished was to add to the revenue of the state; and there is nothing in the act itself indicating that the question of regulation is not merely incidental to the main purpose of revenue.

The defendants claim that the state law is ineffective as against a permit which they hold from the United States authorizing them to dredge sand from the Kansas river. The permit amounts to nothing more than consent that so far as the right of the government to control the stream for the purposes of navigation is concerned the defendants may continue dredging. In this respect it is not unlike the permits or licenses issued by the internal revenue department authorizing persons to engage in the sale of intoxicating liquors in Kansas. It has never been supposed that such a permit furnishes immunity to the holder from prosecution for a violation of our prohibitory laws.

The legislative history of chapter 259 shows that it was legally adopted by the legislature. The original bill was known as house bill No. 219. It was read three times in each branch of the legislature and on separate days. The main objection to the manner of its passage is, that in the senate the judiciary committee simply reported a substitute for house bill No. 219. It appears, however, that the substitute was germane to the title and that exactly the same result could have been accomplished by returning the original bill and recommending its passage with the amendments. The precise question was before the supreme court of Tennessee in a recent case. (*Railroad v. Memphis*, 126 Tenn. 267, 148 S. W. 662, 41 L. R. A., n. s., 828.) The language of the court in disposing of the contention is so pertinent that we adopt and approve it. In the opinion it was said:

"It is said the committee on municipal affairs simply reported a substitute for House Bill No. 175. The distinction sought to be made between reporting a substitute bill and an amendment by substitution is more fanciful than real. As stated, the title of the bill remained the same, and the substitute offered for the original is germane to the title, and is otherwise unobjectionable. The bill cannot be destroyed upon a mere matter of terminology. If it were competent, as is conceded, for the original bill to have been amended by substitution, so as to ingraft upon it the same matter that was contained in the substitute bill, we can see no substantial reason why it is not just as permissible to offer the same subject-matter under the original title as a substitute for the original bill." (p. 293.)

Whatever rule may obtain in other states, in Kansas "an enrolled statute imports absolute verity and is conclusive evidence of the passage of the act and of its validity, unless the journals of the legislature show affirmatively, clearly, conclusively and beyond all doubt that the act was not passed regularly and legally, and this rule applies to the title as well as to the body of the act." (*The State v. Andrews*, 64 Kan. 474, syl. 1, 67 Pac. 870.)

The title to the act is as follows:

"An Act relating to the sale and taking of sand, oil, gas, gravel, mineral and any natural product whatsoever from the bed of any river which is the property of the state or any island therein, and relating to the taking and sale of hay, timber and other products of lands lying in the bends of such rivers; prescribing certain powers and duties of public officers in relation thereto; and prescribing penalties, and repealing inconsistent legislation."

Under the authority of *The State v. Barrett*, 27 Kan. 213, *The State v. Brooks*, 74 Kan. 175, 85 Pac. 1013, *Bank v. Pearce*, 76 Kan. 408, 92 Pac. 53, and decisions cited in the opinions in those cases, it must be held that the title contains but one subject and is broad enough to cover every provision contained in the act. It would be sufficient if the title had read, "An act relating to the sale and taking of sand from public streams within the state."

Whether the legislature may provide, as section 8 of the act
117 purports to do, that certain evidence shall be prima facie proof of a fact material to be established in order to warrant

a conviction in a criminal case need not be determined. No such question is involved here. Were it conceded that the legislature has no such power it could avail the defendants nothing. It is expressly provided in section 9 of the act that if any provision be held unconstitutional the judgment shall not affect the other provisions, and without this provision it would be our duty so to declare. The certificates of the officers of the house and senate with the presumptions which will be indulged in favor of the regularity of the act are sufficient to show that it was presented to the governor within proper time and duly signed. (*Aikman v. Edwards*, 55 Kan. 751, 42 Pac. 366.)

The contention that the act attempts to confer judicial power upon executive officers is answered by numerous decisions which need not be reviewed. The executive council is an administrative body, and it is well settled that the legislature may create agencies to carry laws into effect, and that where judgment or discretion is exercised as a mere incident to a ministerial power there is no commingling of judicial and executive powers. (*The State v. Railway Co.*, 76 Kan. 467, 92 Pac. 606, and cases cited in the opinion.)

We have considered all of defendants' numerous objections to the act of 1913, and find no ground upon which we would be justified in declaring it repugnant to the constitution of the state; and since the defendants never acquired, either by grant or prescription, any right or title to the bed of the Kansas river, nor any right to the sand in the bed and channel of the stream, the act does not deprive them of any property rights and can not be considered as in conflict with any of the provisions of the constitution of the United States.

The defendant F. J. Schwartz is in no way interested in this litigation since it appears that he has voluntarily paid the royalties without protest. His motion is sustained and the action will be dismissed as to him and judgment given in his favor for costs. As to all the other defendants, judgment will be entered for the plaintiff, and the peremptory writ will be allowed.

118 And afterward, on the 1st day of May, 1915, there was filed in the office of the clerk of the supreme court of the state of Kansas, Petitions for rehearing by F. D. Fowler, The Stewart-Peck Sand Company, and the Wear Sand Company, which petitions for rehearing are in the words and figures as follows, to-wit:

119 In the Supreme Court of the State of Kansas.

No. 18985.

THE STATE OF KANSAS, ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff.

vs.

EARL AKERS, as State Treasurer, et al., Defendants.

Petition of Defendant F. D. Fowler for Rehearing.

Comes now the defendant, F. D. Fowler, and prays the court to grant him a rehearing in this case for the following reasons:

That Mr. Justice Porter, who wrote the opinion in this case, has overlooked and failed to pass upon and decide certain propositions, which entitle the defendant F. D. Fowler to judgment.

For his first ground for a rehearing, defendant F. D. Fowler alleges and avers:

Defendant F. D. Fowler plead in his supplemental answer, filed September 19, 1913, beginning with the 12th line on the 2nd page as follows, to-wit:

"The Kansas River is not a navigable stream now, nor was it navigable when this Government acquired the territory, known as the Louisiana Purchase, from the Republic of France in 1803. Therefore, when this Government sold said Lot 5, it included the adjoining bed of the Kansas River to the center or thread of said river, and this defendant's lessor, H. C. Root, is now the owner through a chain of conveyances from the patentee, George Gardner, and in possession of said portion of Lot 5, including the bed of the Kansas River to the middle or thread of the same."

The state does not, in its application for the alternative writ, aver or claim that the Kansas River in the vicinity of Topeka, Kansas, is a navigable stream, and there are no facts which the court can take judicial notice of denying the defendant's allegation, that the Kansas River is a non-navigable stream, but the fact that when this territory of Kansas was surveyed in 1854 the Kansas River was meandered by the Government surveyors, which fact of meandering a stream by the Government has been held to be competent evidence taken into consideration with other facts proven of the navigability of waters. But has never been held to be conclusive
120 evidence of the navigability of waters until the decision in this case.

Marshes are meandered by Government surveyors when impracticable to cross them, and mountains are meandered by surveyors when impracticable to scale them, but such fact of meandering has never been held by any court that either marshes or mountains were navigable waters for that reason; which illustrates the fact, that because the Kansas River in the vicinity of Topeka was meandered when surveyed is wholly insufficient to overcome the allegation of the non-navigability of the Kansas River in a proceeding of manda-

mus. And for the purpose of this action the plea of non-navigability of the Kansas River at this point must be taken as an admitted fact, giving it the same force and effect as if conclusively proven.

Defendant further calls the court's attention to the fact, that the writer of this opinion has failed to consider the rights of this defendant, which he contends for and pleads in his supplemental and amended answer, that section 2476, of the United States Statute, passed in 1796, and which was in full force and effect in 1859, when the Government sold and issued its patents to the land, on which defendant is operating his sand plant, to George Gardner, which section of United States Statute 2476 reads as follows:

"All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways; and in all cases where the opposite bank of any stream not navigable belong to different persons, the stream and the bed thereof shall remain common to both."

The fact of non-navigability of the Kansas River at Topeka being established through defendant's plea, and not refuted by any sufficient evidence only the fact that the river was meandered when surveyed, the last part of said section 2476, "and in all cases where the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall remain common to both," is incontrovertible as applied to this case. This being the law of the Federal Government when this land was patented, shows the policy of the Government, and it being a part of the law was enacted for some purpose, and the only force and effect it can have is to carry title to the patentee, unless specially reserved, by
 121 some other act, or by the terms expressed in the patent, which was not done, either by act of Congress or by the terms of its patents. Necessarily, it thereby carried the title of the bed of the Kansas River to the patentee George Gardner in 1859.

Defendant further shows, that the Act of Congress admitting Kansas as a state January 29th, 1861, was upon the express condition, which was solemnly accepted by a vote of the people of the territory of Kansas, to-wit:

"The following propositions are hereby offered to the people of Kansas for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the state of Kansas, to-wit: (Sec. 5, a part of which provides,) "Provided, that the foregoing propositions hereinbefore offered are on the condition that the people of Kansas shall provide by ordinance, irrevocably without the consent of the United States, that the said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulation Congress may find necessary for securing the title in said soil to bona fide purchasers thereof."

Congress never having changed the law of 1776, as above quoted, which carried the title of the United States patents issued in 1859, for lands bordering upon non-navigable waters to the thread or middle of the stream, can the Legislature of Kansas, 54 years after

title has vested to the lands in question, or a decision of this court, divest the defendant's lessor of title to the river bed without due compensation?

For a second and further reason why the judgment of this court should be rendered in defendant Fowler's favor and upon which question defendant asks for a rehearing is as follows:

The court has decided in its judgment in this case that the Kansas river, like the Amazon, the Mississippi, and the Danube, is a navigable river, actually carrying commerce although the Kansas River has never been navigated and it is now and at all times during its history — been a physical impossibility for a boat or vessel to pass over and up and down the river in the vicinity of Topeka, Kansas, or within fifty miles of said city. But if the court adheres to and upholds its judgment, then this defendant Fowler, through his lessor, is entitled to certain riparian rights and privileges, 122 which have been held to be the common heritage of the riparian owner for all time.

The court has decided in its opinion, that the sand in the Kansas river, as defendant Fowler has plead in his answer, is fugitive, moving, contained in the running water, coming down said stream from its farthest reaches, as some of its tributaries extend into other states, and therefore the sand forms no part of the fixed and permanent bed of the river. The dredging and pumping of sand and water out of the Kansas River does not impair or affect the bed of the river, as this defendant has demonstrated and proven the fact, that he has dredged sand for more than 16 years from one location, and in area not to exceed a few rods square, and in all of said 16 years' work neither changed nor lowered the river bed, nor impaired or affected the banks of the river, nor injured the lands directly across the river from his location, nor land above or below his location on the same side.

Defendant further shows that sand while in the running water and forming a part of the flowage of the stream is of no value or use, and at times becomes a menace to bridges that span the river, and has no commercial value whatever. The sand which is a part of the flowage of the river is like the fish that swim therein, or like the birds of the air—of no value unless reduced to possession, after which they become personal property.

The sand is taken out of the river mixed with water by the defendants in two ways, one by a large machine known as a sand dredge, the other by a centrifical pump, after which the sand and water are separated, the water flowing back into the river, leaving the sand, which thereby becomes personal property and valuable for use in the construction trade of the country. A dealer in sand then has the right to use the same, or dispose of it in the open market, under the same custom and law that the fisherman or the hunter, after he has obtained possession of the fish or fowl when they reach the dignity of personal property and become useful food for man.

The court says, in *Clark v. Aliman*, 71 Kan. 206, that "the common law rule in relation to riparian rights became the law of Kan-

123 sas for every stream within its borders." And in the case of the City of Emporia v. Sodem, 25 Kan., 588, this court has decided the right of flowage is a riparian right that a party cannot be divested of without due compensation.

The moving, drifting sand in the current of the river is a part of the flowage of the river, like the fish therein, and the riparian holder has the same right to pump or dredge the sand out of the running stream that he has to pump the water, catch the fish, provided, he does it in such a way as not to injury his neighbor, either above or below who is situated on the same stream.

The oyster bed cases cited by the attorney general in his brief are not pertinent to the facts in this case, for the reason, that the oyster lives in a fixed location in the permanent bed of the water, and to be of commercial value requires the labor of man to cultivate and perfect it. But the sand is contained in the current of the river and is thereby a part of the flowage of the river, and is of like character to the fish that do not stay in a given locality but swim from place to place and are caught, either by fish hooks, nets or spears; fish caught in this manner have, from the very dawn of man's history upon earth, been held to be the property of the fisherman.

Clark v. Aliman, *supra*: "Laws are not like garments, which citizen and judge may put on and off at will. To have the force of law, a rule must possess the quality of uniformity and universality, and must operate upon all members of the entire political community affected by it alike."

We may ask, can the legislature deprive a person of his title to land that he acquired through the Federal Government over sixty years ago, or this court hold that acts of Congress and the territorial legislature of 1855 are meaningless? And, on the other hand, if the legislature and this court can destroy his patent title to the river bed of over sixty years standing and in the face of the 71 and 25 Kansas cases, *supra*, and deprive him of his riparian rights under the law, then the protection of the Federal Constitution, that a party cannot be deprived of his property without due process of law becomes a travesty.

124 Wherefore, defendant Fowler respectfully asks this court to grant to him a rehearing upon the above and foregoing propositions, which the Honorable Judge who wrote the opinion has wholly overlooked in his opinion and judgment rendered therein.

HIRAM C. ROOT,
Attorney for F. D. Fowler.

Endorsed: No. 18985. Supreme Court of the State of Kansas. The State of Kansas, ex rel., John S. Dawson, Attorney General, Plaintiff, v. Earl Akers, as State Treasurer, et al., Defendants. Petition of Defendant F. D. Fowler for Rehearing. H. C. Root, Attorney for Defendant, F. D. Fowler. Filed May 1, 1914. D. A. Valentine, Clerk Supreme Court.

25 Filed May 1, 1914. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18985, Original.

STATE OF KANSAS ex rel. JOHN S. DAWSON, Attorney General.
Plaintiff,

vs.

EARL AKERS, as State Treasurer, et al., Defendants.

Original Proceeding in Mandamus.

Petition for Rehearing.

Come now the defendants Stewart-Peck Sand Company, Stewart-Peck Southwestern Sand Company and Wear Sand Company, and, petitioning this Honorable Court for a rehearing upon the several issues decided in the above cause, respectfully show the court:

First. It is respectfully represented that the court in its decision in this cause, has given to certain observations of the courts of Oregon, Iowa and other states, and included in the opinion of the court herein as quotations from the decisions of such courts, a force and effect to which such observations are in nowise entitled, in this, that such observations refer to matters in nowise essential to the disposition of the case then under consideration upon the facts presented for adjudication; for which reason, the observation referred to must be considered merely as the personal suggestions of the writer of the specific opinion and not as the utterance of the court determinative of the law. Of such character is the quotation from Haight vs. Keokuk, 4 Iowa, 199, appearing upon page twelve of the opinion of this court herein. It is respectfully suggested that the question at issue in that cause was not whether the General Government had power to make, or had attempted to exercise the power to make the grant claimed, but whether the United States had in fact made such a grant. The observation quoted was, therefore, the mere utterance of the writer of the opinion, entitled to respect to that extent, but did not constitute an utterance determinative of the law. The force and effect given the utterance quoted by the Court in deciding this cause adopts the language without qualification and gives it the force of the express utterance of this Court. Counsel

126 do not understand that this court intends to so announce the law and, if we are right in this view, the opinion should be so modified as to confine its effect to the point intended to be decided. If it be the intention to so decide, it is insisted that the point involving, as it does, the rule of property, should be made specific and beyond cavil.

It is respectfully pointed out, however, that the title to no part of the Wyandotte lands initiated in the general land laws of the United States. That Nation of Indians had certain rights concern-

ing which they contracted with the United States. At the date of the issue of the patents to them the law of the Territory was plain. That law embraced provisions concerning and governing titles to real estate within its borders and such patents must be held, in the absence of anything to the contrary, to have been issued pursuant to such law. Whether the United States had power by the compact and solemn contract to make provision vesting the title conformably to the Territorial laws is here at issue, and should receive more support from authority than from mere dicta. It is true that the court cites with approval *Shively vs. Bowlby*, but, it is most respectfully urged, that the learned writer of that great opinion transgressed the rule against expressing an opinion of the Court upon matters not in issue, when he attempted, (if, indeed, he did attempt, which is open to grave doubt), to limit the purposes for which the United States might make a grant of the beds of technically, non-navigable streams. A most significant circumstance in connection with that opinion shows that the question received no judicial consideration. Quoting from the opinion of this Court in its remarks upon the decision in that case: (Opinion p. 14) "It was settled that the little to tide lands or arms of the sea below ordinary high water mark is in the King, except where rights have been acquired by express grant, or by prescription, or usage." Note well the clause which follows:

127 "The doctrine was declared to be well settled here, as in England, that a grant from the sovereign bounded by navigable tide water passes no title below high water mark, unless either the language of the grant or long usage under it, clearly indicates that such was the intention."

Under the clause first quoted, it would appear that the title to all tide lands and arms of the sea was vested in the sovereign under all circumstances, but the statement is too general, for unless the arm of the sea was navigable in fact as well as tidewater, the title vested in the adjoining littoral proprietors.

State vs. Pacific Guano Co. 22 S. Car. L. C. 55.

Miles vs. Rose, Taunt. 706, per Gibbs, C. J.

Mayor of Lynn vs. Turner, Cowper, 86.

Cates vs. Wadlington, 1 McCord, (S. C.) 356.

The later quoted clause expresses absolutely the common law and the word, navigable, there used, when taken in its meaning, viz., navigable in fact, qualifies the prior statement.

It is respectfully represented that the use of such general expressions should not be permitted the effect of declaring the law upon questions not before the court for adjudication.

The case of *Shively vs. Bowlby* arose under the donation act of Congress adopted for the purpose of assuming legal titles where equitable claims called for adjustment. It must be remembered that England was a rival claimant to the United States in the ownership of this Territory; that under the laws of that Country no equitable title could, in ordinary course, arise to navigable tide lands; that under the general laws and policy of the United States the rule was the same and that the lands in litigation in that case were navi-

gable tide lands. The decision, therefore, must be limited to the question presented for adjudication and as so limited cannot be held or taken to adopt or approve the exceedingly broad construction given by this Court to *Hinman vs. Warren*, and can there by any doubt of the power of the United States to make a grant along the lines referred to in *Shively vs. Bowlby*, even after the admission of the State into the union and after its general title has been transferred to the State?

128 Again, referring to the paragraph of the syllabus in the latter case, quoted upon page 13 of the opinion herein, it is respectfully submitted that too broad an effect is given to its utterance. The mere fact that a Territory should be admitted to Statehood, with title to the beds of its (technically) non-navigable waters vested in individual riparian owners would not, of itself, militate against the admission of a state into the Union upon equal footing with the other states. The great majority of the New England States recognized the common law doctrine as to riparian ownership upon non-navigable streams and as to lands not granted prior to statehood, the state has the same right as all the other States to determine her future policy. None of the original states ever claimed or attempted to claim or exercise the right to adjudicate adversely to titles vesting under their colonial laws. The colonial condition might well be compared with condition territorial; and even then, unfavorable to the colony as the latter never could hope for statehood save through revolution. The colony legislated by permission of the King. The Territory by grant of power from the United States as sovereign.

The quotation from *Shively vs. Bowlby* on pages 15 and 16 of the Court's opinion herein, must be confined to what is under consideration, viz., the policy of the general government with reference to its own immediate acts. The power of a Territory to legislate with reference to its local policy is nowhere touched upon in any of the decisions cited in support of the decision of this court upon this point.

Again, it is respectfully submitted that *Shively vs. Bowlby* does not, either in terms or by implications, limit the granting power of the General Government to instances where it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for purposes of commerce, or for other like public purposes; as stated upon page 16 of the Court's opinion herein. It is true that Justice Gray uses the language imputed to him, but it is also true that such language does not
129 imply limitation, but enumeration and expression by way of instance. One of the objects for which the United States hold their territory is the encouragement of settlements thereof and the erection of states therefrom. And, if, pursuant to such object, the foundation of a state be laid by the erection of a territory therefrom, is not that one of the objects for which the United States hold the Territory; and is there anything in the expressed public policy of the General Government which prohibits such embryo state from outlining, in its laws, its accepted local policy in relation to titles

within its limits? If such limitation there be, we have failed to find it, after diligent search.

The quotation from 9th Porter, upon page 17 of the opinion of this Court in the case at bar is not decisive or even persuasive of the question here under consideration. The title to the territory out of which Alabama was afterwards erected into a state, was absolutely limited by the terms of the deed of conveyances and cession from the State of Georgia. The Federal Government never had a sovereign title to the lands within that state. When the object of the trust was accomplished the title of the Trustee, of necessity, ceased. It will hardly be contended that the Federal Government renounced the powers vested in it by the Constitution, yet viewing the quotation in its apparently broad sense, such result would follow. It must also be kept in mind that the words "navigable waters" here used must be understood in the technical sense of the common law which prevailed in that State at the date of the decision referred to. The quotation from *Hardin vs. Jordan* and *Hardin vs. Shedd* upon the same page of this Court's opinion, (17), must be construed in view of the conditions which called for the rendition of those opinions. The grants referred to and under consideration were made, as we understand the facts, after admission of the Territory to statehood. It must also be kept in mind that these cases come up from Illinois which recognizes and uses the word "navigable" in its technical common law sense.

The quotation from *McManus vs. Carmicheal*, on page 18, makes no mention of what would be the effect of a territorial law expressing the public policy of the Territory with reference to titles within its boundaries. It may be admitted that grants by a sovereign
130 are to be construed strictly as against the patentee or grantee, and even then the quotation is inapt to sustain the position of the Court; and that from *Shively vs. Bowlby* on the same page refers to lands below high water mark on tide waters solely. No title to tide waters or lands beneath tide waters is here in question. The law in force at the time the titles here involved were vested, recognized the English distinction between tide lands and lands sub-jacent to water nontidal.

The policy and law of Wisconsin, adverted to upon the same page of the Court's opinion herein expresses the common law as to public rights in fresh rivers navigable in fact.

Palmer vs. Mulligan, 3 Caines, (N. Y.) 1. c. 319.

Ex parte Jennings, 6 Cowen, (N. Y.), 1. c. 527.

State vs. Pacific Guano Co. 22 S. C. 1. c. 55.

Deerfield vs. Arms, 17 Pick (Mass.) 1. c. 42.

Lorman vs. Benson, 5 Mich. 18.

Little Rock, etc., Ry. vs. Brooks, 39 Ark. 1. c. 408.

Executors of Cates vs. Wadlington, 1 McCord, (S. C.)

McCullough vs. Wall, 4 Richardson 84, citing.

Kents Commentaries, 428.

Says Judge Wardlow in the case last cited:

"Perhaps the principal occasion for dispute on the subject has

been the use of the term 'navigable' which has a popular signification different from the technical one which is given to it by the common law * * * . Arguments on both sides, drawn from considerations of policy and the law of other countries have been addressed to us. On one side are commendations of the common law rule for its wisdom and careful protection of all rights involved, its adoption by many of our sister states which are traversed by large fresh water rivers: and the unquestionable authority upon it rests: On the other side are the examples of continental Europe, Pennsylvania, Alabama, and some others of these United States, the Civil Law and some inconveniences thought to result from subjecting to a rule which was formed for small and short streams, mighty rivers upon which as upon inland seas, ships that have crossed the ocean may be safely navigated far above the reach of the tide, etc."

And eventually, the court finds no difficulty in determining that public waters and private rights in the beds thereof are by no means incompatible.

It is to be observed that Wisconsin originally was a part of the Northwest Territory and the title to all of that soil was vested in the United States as an express trust strictly to the Act of Cession from Virginia. This limitation upon such title is what is recognized and referred to in the quotation from the Wisconsin Supreme Court, cited at page 19 of the opinion of the court herein.

131 The laws of Kansas relied upon by defendants never were in force in Oklahoma and the decisions in the Mackey and Nolegs cases are of little use as precedents. As we have seen in our brief filed herein, the opinion of Judge Campbell would have been different had he the Kansas law before him.

It is respectfully urged that Wood vs. Fowler does not foreclose the question of the extent of the title of these defendants as held upon page 21 of the Court's opinion. The question as to the effect of the Territorial Statute and its subsequent adoption by the State upon its admission into the Union, was not before this Court in Wood vs. Fowler, as is evident from the opinion therein. That decision may foreclose questions connected with the title to the specific tract there in question, but it certainly cannot foreclose the question as to the owners of other lands not involved in the controversy and who were not parties to the action. The quotations from that case upon page 22 of the Court's opinion in the case at bar, are met and their force defeated by the same proposition. The law here invoked was not before the Court.

The quotation from Governor Reeder's message of July 3, 1855 appearing upon page 27 of the Court's opinion herein furnishes one of the reasons for the broad wording of the Act of the Territorial Legislature of that year: It was determined that the conflicting rules referred to should be dispensed with and the common law alone be the law of the Territory, (and by its subsequent adoption, such became the law of the State), and this very quotation furnishes the refutation of the paragraph of this Court's opinion which follows on the same page (27). If Governor Reeder's message correctly states conditions it is impossible that the Act of 1855 merely declared

existing law. If the Common Law as it existed prior to the fourth year of James First, was the law in Kansas Territory any law, custom or usage to the contrary notwithstanding, how could the laws of Indiana Territory,—the laws of Louisiana, the laws of the Territory of Missouri and the laws of the Province of Louisiana be also in force? The conclusion is absurd. The act of 1855 was not and could not be declaratory of the law then in force.

132 The quotations upon page 28 fail to meet the point. The wide, broad and deep provisions of the Statute of 1855-1858 were not before the Court in *Pollard's Lessee v. Hagan*, nor in *Chishold vs. Georgia*.

The only subject under consideration in *Carson vs. Blazer*, 2 Binn, (opinion p. 29), was as to the existence of a several fishery in the Susquehanna. The right of private property in the subaqueous lands was not in issue and was not decided. Indeed there are many expressions throughout the opinion which tend to show that there is no necessary conflict between the public control of public waters and private ownership in the bed of the stream subject to the public easement. Again it must be kept in mind that the term navigable is nowhere used in its technical, but is every where used in its popular, sense, throughout the opinion. The same is true of the expression as used in *Wilson vs. Forbes*, 2 Dev. (N. C.), 30 (opinion p. 29).

It is difficult to perceive the cause of the eulogium upon *McManus vs. Carmichael*. Judge Dillon's statement merely showed that he was not well read in the English common law governing navigable waters. As we have seen before, (see page — this petition), the Mississippi would have been navigable in fact under that law and the public right of highway and thoroughfare, with all *annexed* rights and powers, would have been thoroughly protected, and interference with those rights by obstruction would have been indictable as a common nuisance, and Mr. Justice Woodward falls into the same error as does Judge Dillon. The former jurist however, admits that the Northwestern states have accepted the common law rule (opinion herein p. 31), and also admits (in syllabus), that at common law there were other tests than ebb and flow of the tide in determining navigability for public purposes.

With reference to the quotation by Judge Woodward from 5 Wend. (opinion p. 31), it is hardly necessary to call attention to the fact that the Hudson is a great river navigable, far above the ebb and flow of the tide, and yet the common law rule, using the word 'navigable' in its technical sense, is held applicable to it.

Ex parte Jennings, 6 Cowen, 518.

Palmer vs. Mulligan, 3 Caines, (N. Y.), 319.

133 In citing as authorities cases involving the title to fresh water streams in the Northwest Territory, much confusion may be saved by at all times keeping in mind the act of Congress of 1796, which vests the title to rivers not navigable for vessels used in interstate commerce, in the adjoining riparian proprietors. By thus designating the stream upon which the title did not pass, the

government necessarily enacted, with reference to the streams that could be navigated, that the title did not pass. The Mississippi river was, at least as to one half of it, within this Territory.

See *Ross vs. Faust*, 54 Ind. 471.

It is well to note this statute carefully for by it the United States actually proclaimed its right to pass title to the beds of streams which may in fact, be navigable in other respects than by vessels used in interstate commerce. Were the Kansas situated in that section what would have happened to its bed? Even the doctrine of *Wood vs. Fowler* could not have saved it.

In Nevada the common law doctrine prevails.

Shoemaker vs. Hatch, 13 Nev. 261.

It is strange indeed that the case of the *Genesee Chief*, 12, Howard, 443, should be cited to sustain the doctrine of the opinion in the instant case. The *Genesee Chief* case merely describes that Admiralty law properly applies upon all waters in this country navigable in fact and bases the decision upon a statute of the United States. How this can be construed as holding that rivers navigable in fact can no longer be considered as subject to the rule of the English law governing titles to the beds of fresh water streams, we are at a loss to determine; The more so, as the Court, in its opinion, overruling its holding in the case of *Thomas Jefferson*, expressly states that it disturbs no rule of property. If the decision in the *Genesee Chief* case establishes a rule which would govern in determination of titles, then the case of the *Thomas Jefferson*, of necessity, did the like. The Supreme Court itself says it did not do so, hence it follows that neither does the case of the *Genesee Chief*.

The citation upon page 34 of this Court's opinion, from *Barney vs. Keokuk*, would seem, for the first time in the United
134 States Courts, to determine authoritatively, that the old rule as to ownership of the beds and shores of such waters might be dispensed with. If titles had already vested, could this decision affect such titles? We think not. And it must be remembered that the Court was not there considering any such statute as that of the Kansas Territorial law of 1855, afterwards adopted by the State and also was well within the established rule that with reference to such titles, the United States Courts were bound by state decisions. The case was an Iowa case. The language quoted on this Court's opinion, (p. 35), from *Packer vs. Bird*, is utterly at variance with the Common law as it existed prior to the fourth year of James the First, and therefore directly opposed to the law as it existed in Kansas at the time the titles here in issue vested. Whatever may be its applicability to the Kansas Statute of 1868, it certainly has none to that of 1855. The legislature of Kansas having by statute enunciated and determined its policy, such policy must prevail.

We respectfully insist that under the wording of the Statute of 1855, this Court has no authority in this case to attempt to determine what is the common law as modified by the wants and conditions of the people. If the court had authority to do so under

that statute, why the change of wording in the enactment of 1868? Did the legislature do a vain and useless thing when it proceeded to, in words, qualify in the strongest manner, the former statute? This Court is not in the habit of imputing to the Legislative Arm of the State any act so silly and wholly useless.

We respectfully submit that the decisions cited by this Court, when subjected to careful analysis and classification fail to sustain the ultimate decision upon this question in the case at bar, because none of the cases consider and apply the English Common Law as it existed prior to the Fourth year of James the First, but all acknowledge and specifically state that they maintain a doctrine which is an absolute departure therefrom.

Defendants respectfully submit that the decision of the court in this case, ignores the peremptory requirements of the Statutes of

135 Kansas; deprives them of vested titles and estates and, therefore, is unconstitutional, and contravenes the provisions of the fourteenth amendment to the Constitution of the United States.

The decision is specifically based upon the holding that the ancient rule of the common law was never a part of the common law of Kansas, in spite of an enactment adopting such law. An enactment which has not been questioned for over fifty years and which formulated the rule of property. So serious a question, so decided, we submit entitles us to a rehearing. We respectfully submit that such rehearing should not be denied, and should be granted these defendants.

Second.

The Principle of *Feræ Naturæ*.

It is respectfully represented that the Court seems to have misunderstood entirely the trend of the decisions quoted in defendants' brief with reference to materials and things *feræ naturæ* and coming within the principle of that doctrine, for instance, the Seaweed cases. The decisions are not intended to be authority with reference to things cast upon the estate of a land owner. These cases decide that until cast upon the land of the littoral or riparian proprietor. they are common property and may be reduced to possession and ownership by the first person who performs an act of appropriation with reference to them.

Third.

Prescription.

Defendants strongly urge that in its treatment of this contention of defendants, the Court fails to grasp the proposition as presented. We again appeal to the common law of England as prevailing in Kansas under the Statute.

By the laws of England what is otherwise common may, be pre-

scription, be appropriated. Gratius owns that navigable rivers may be appropriated.

Carter vs. Muncott, 4 Burros (8 Geo. III), l. c. 2164, per Lord Mansfield and Mr. Justice Yates.

There is no conflict of the authority we submit, when the principles governing prescription and limitation are differentiated. In the one case, that of limitation, the claim is adverse to the State. In prescription the right is claimed from the State, based upon a conclusive presumption arising from evidence introduced. Prescription presumes a grant from the state proved, not indeed by the grant itself, but by evidence of acts *which* of the prescriber which, ordinarily, would be referable to a grant. The right here claimed by prescription is that of taking sand from the waters of the river as it has been taken therefrom by them for the last thirty-five years. The right is not claimed adversely. It is claimed prescriptively.

The distinction between prescription and limitation, we respectfully urge, has been overlooked by the Court. While limitations will not run against the State, prescription will.

"The presumption of a grant proceeds upon a different assumption (than limitation). The presumption of a grant is the negation of trespass. It does not impute laches or claim the benefit of a successful disseisin. It does not claim title against but from the State. Instead of producing the highest evidence of a grant, to wit: the grant itself, a rule of evidence, which is now also a rule of property allows the proof of certain facts to establish the equivalent of a grant to put the tenant in the same strong position that he would occupy if he had an actual grant that he was able to produce. No right of the State is thus denied. Time does not run against her, but proof of years of acquiescence are allowed to raise the presumption of the performance of a sovereign act. To attribute a voluntary act to a free and intelligent agent and to hold others bound by it, while the agent himself was not, would be unreasonable. It appears, therefore, that the reasons why the statute of limitations does not run against the state do not apply to the presumption of a grant and such presumption may be set up against the State."

State vs. Pacific Guano Co., 22 S. Car. l. c. 54, 55.

The act in question in this case recognizes, by its express provisions, that a grant of the beds of fresh water streams may be made. The State contends for that power vested in it. Why then may not the presumption of a grant arise. The method of proof of a grant provided by the act, did not exist until 1913, and that provision of the act cannot be made retroactive in its effect if the result would be the deprivation or destruction of property rights already provable under the rule of evidence theretofore existing.

"In cases of this kind, where it is a question of construction, there is no doubt that such construction should be most liberal in favor of private right."

Ex Parte Jennings, 6 Cow. (N. Y.), l. c. 525.

137 By the decision of the Court upon this point, the defendants are deprived of property rights which have vested in them through long user and by acts sufficient to sustain the presumption of a grant, whereby the provisions of the fourteenth amendment to the Constitution of the United States are violated.

Fourth.

The Sale of Sand.

It is respectfully represented that upon the question as to the right of the state to sell the bed of the stream the decision in this case is not consistent with other portions of the opinion. The court insists that sand, mixed and flowing with the water is part of the bed of the stream, while upon page 42 of the opinion it is stated that the State has not undertaken to sell any portion of the bed of the stream. On pages 44 and 45 of the opinion, the court holds that the object of the act was to obtain revenue for the state. Now the only means provided of obtaining such revenue is by the sale of sand, etc., as stated expressly in the act itself.

If, then, the said is the river bed or forms a part thereof, and sand is to be sold, then the river bed or a portion of it is being sold for the enrichment of the public treasury and we insist, under the authorities presented that the state is without power to do so. The point appears to have been entirely overlooked by the Court in its opinion.

With reference to the Attorney General's statements concerning the beds of navigable lakes, we respectfully refer again to the law governing such waters. It never has been the same as the law governing streams. Even Illinois, as pointed out by these defendants in their briefs, so holds. The contention of the State in this case, therefore, receives no support from anything which may be done by the States with reference to lakes or ponds and their beds. It is respectfully asked how can the State be the absolute owner of the bed of a stream (opinion p. 43), if it holds the title in trust? The trust is not defined, and failing to so define, the opinion supports the State in an act unsupportable only upon the theory of absolute ownership in the Actor. The cases cited by the Court and mainly relied

138 upon to sustain the decision on this question refers to waters navigable, technically, at common law and cannot support the theory as applicable to waters navigable in fact and above the ebb and flow of the tide.

By such application of rules of law which are applicable only under conditions wholly different to those here existing the defendants are deprived of a right common to all of the people, a right in the nature of property and which is valuable, and that without compensation made therefor, contrary to the provisions of the fourteenth amendment to the Constitution of the United States, the protection of which amendment defendants claim.

Under the theory of this decision a citizen may not hire a laborer to shovel sand into that citizen's wagon, even though the sand be for

the citizen's personal use, without such laborer being subjected to payment of a royalty. The laborer is not taking the sand for his own use, consequently he is not entitled to earn his daily bread by shoveling it, unless he pays the State a royalty for that privilege. A harsh doctrine truly.

Fifth.

Passage of the Bill.

In this connection the Court's decision is based upon an error of fact. The 6th subdivision of the syllabus shows that the court assumes it to be a fact that the title to the act was not changed by the Senate Committee. This view is not correct. For the enlightenment of the Court upon this point, we incorporate herein as a part of this petition the appendix to defendant's original brief appearing upon page 112 to page 120 inclusive, thereof.

The title to the original bill (House Bill 219), is as follows:

"An Act relating to the sale and taking of sand, gravel and mineral from the beds of navigable rivers of the state, and of hay, timber and other products from lands lying in the beds of such rivers; prohibiting the taking thereof without consent of the executive council and providing penalties for the violation hereof."

While the title to the substitute bill is as follows:

129 "An act relating to the sale and taking of sand, oil gas, gravel, mineral and any natural product whatsoever from the bed of any river which is the property of the State, or any island therein, and relating to the taking and selling of hay, timber and other products of lands lying — the beds of such rivers; prescribing certain powers and duties of public officers in relation thereto; and prescribing penalties, and repealing inconsistent legislation."

We submit that the title of the substitute bill is essentially different from that of the original, including subject matter not contained in the original.

Under the conditions we respectfully insist that the passage of a bill through the Kansas Legislature in the manner in which this bill was passed is violative of the compact between the United States and the State of Kansas, upon which the State of Kansas was admitted into the Union. That the provision made for the reading of bills three times was an essential provision of that compact intended to promote the security and welfare of the people and that sustaining the action of the legislature in connection with the passage of this bill, this Court is approving and confirming an act violative of the fundamental law of the state and of the United States and deprives defendants of the Security provided by the act of admission of the State into the Union upon the faith of the provisions of the Constitution of Kansas and of Section 15 of Article 2 of said Constitution.

Sixth.

Legislative and Judicial Authority.

It can hardly be held that where absolute and unrestricted power is given to an administrative body to fix royalties, without right of appeal against the acts of that body, that the power so granted is merely incidental. It is clearly analogous to the levying of taxes. There are certain limits prescribed in the case of taxes within which an administrative body may act. There is no such limitation in the act here in question. The Court seems to have overlooked this point.

140 A law investing a body of officials with arbitrary discretion which it is possible may be exercised in the interest of a favored few is invalid for conferring legislative power.
Noel vs. The People, 187 Ill. 587.

And see also:

88 Ill. 243.

59 Minn. 182.

29 Minn. 551.

92 Wis. 63.

166 Pa. St. 72.

If the act confers power to exercise judgment and discretion it confers judicial power.

Insurance Co. vs. Fricke, 99 Wis. 367.

State vs. Doyle, 40 Wis., 175.

State vs. Casey, 2 N. Dak. 36.

Willis vs. Legris, 45 Ill. 289.

Popper vs. Holmes, 44 Ill. —.

It is respectfully urged that the act here in issue is ruled by the doctrine evidenced by these cases; that the vesting of judicial and purely legislative power in an administrative body is subversive of the principles of a Republican form of government; that the act in question confers both judicial and legislative powers and as such is violative of the compact of Union between the States and of the Constitution of the United States which assures to the people of the respective states a Republican form of government; and the decision in this case is open to the same objection in supporting said statute and holding the same valid.

Your petitioners respectfully urge that, the premises considered, they are entitled to a rehearing upon the important questions arising in this case, determining, as the case does, rules governing and establishing property rights and determining adversely to the fixed understanding of the people, rules of property which have existed in the State of Kansas for the full period of its national life.

JOHNSON & LUCAS,
McANANY & ALDEN,
FRANCIS C. DOWNEY,

*Attorneys for Stewart-Peck Sand Company,
Stewart-Peck Southwestern Sand Company
and the Wear Sand Company.*

(Endorsed:) No. 18985. In the Supreme Court of the State of Kansas. The State of Kansas, ex rel. John S. Dawson, Att'y Gen. Pl'ff, vs. Earl Akers, as State Treas. et al., Defendants. Petition for Rehearing. Filed May 1, 1914. D. A. Valentine, Clerk Supreme Court. Porter J. Denied. John & Lucas; McAnany & Alden; Francis C. Downey, Att'ys for peti-oning Def't.

141 Be it further remembered, that on Monday the 18th day of May, 1915, the same being one of the regular judicial days of the January term, 1915, of the supreme court of the state of Kansas, before said court in session at the supreme court room in the city of Topeka, the following proceeding among others was had and remains of record in the words and figures as follows, to-wit:

142 In the Supreme Court of the State of Kansas, Monday, May 18, 1915.

No. 18985.

STATE OF KANSAS ex Rel., Plaintiff,

vs.

EARL AKERS et al., Defendants.

Journal Entry Denying Rehearing.

Now comes on for decision the petitions for a rehearing of this cause; thereupon it is ordered that said petitions for a rehearing be denied.

143 And afterward, on the 21st. day of June, A. D. 1915, there was filed in the office of the clerk of the supreme court of the state of Kansas, a suggestion of substitution, which with allowance thereof and the indorsements thereon is in the words and figures as follows to-wit:

144 In the Supreme Court of the State of Kansas.

No. 18985.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

vs.

EARL AKERS, as State Treasurer; W. E. DAVIS, as State Auditor, and
F. J. SCHWARTZ, Doing Business as the Schwartz Sand Company;
The Stewart-Peck Sand Company; The Stewart-Peck Southwest-
ern Sand Company, a Corporation; C. E. Brown, J. W. Barry,
O. S. Bennett, Louis St. Louis, F. D. Fowler, F. M. Cline, Albert
F. Brundige, Samuel Baggle, and W. B. Rhodes, a Partnership
Doing Business as Baggle & Rhodes; The Wear Sand Company,
a Corporation.

*Suggestion of Expiration of the Term of Office of Hon. John S.
Dawson.*

To the Honorable the Chief Justice and to the Associate Justices of
the Supreme Court of the State of Kansas and to said Supreme
Court:

Comes now Norman S. Wear, impleaded herein sub-nom. The
Wear Sand Company, and respectfully suggests to the Honorable
the Justices of said Court and to the Court that since the entry of the
order of this Honorable Court allowing the Writ of Mandamus in
this cause, the term of office of Hon. John S. Dawson, as Attorney
General of the State of Kansas, has expired and Hon. S. M. Brew-
ster has been elected to the office of, and has qualified for and now is
the acting Attorney General of said State; that proceedings are
about to be instituted in this cause to review, upon Writ of
Error to the Supreme Court of the United States, the judgment and
decree of this Honorable Court in this cause rendered; that due and
orderly procedure requires that the name of said Hon. S. M. Brew-
ster should be substituted in this proceeding for that of Hon. John
S. Dawson, as Relator, to which end an order of this Court is prayed.

NORMAN S. WEAR, *Defendant.*

FRANCIS C. DOWNEY,

DENIS J. DOWNEY,

Attorneys for Defendant.

Allowed,

W. A. JOHNSTON,

Chief Justice.

Endorsed: 18985. State, ex Rel., Plff. vs. Earl Akers et al.,
Def'ts. Suggestion of Substitution. Filed Jun- 21, 1915. D. A.
Valentine, Clerk Supreme Court.

145 Be it further remembered, that on the 22nd day of June, 1915, there was filed in the office of the clerk of the supreme court of the state of Kansas, an application for supersedeas, which application is in the words and figures as follows, to-wit:

146 In the Supreme Court for the State of Kansas.

No. 18985.

THE STATE OF KANSAS ex Rel. JOHN S. DAWSON, Attorney General,
Plaintiff,

vs.

EARL AKERS, as State Treasurer; W. E. DAVIS, as State Auditor, and F. J. SCHWARTZ, Doing Business as The Schwartz Sand Company; The Stewart-Peck Sand Company a Corporation; The Stewart-Peck Southwestern Sand Company, a Corporation; C. E. Brown, J. W. Barry, O. A. Bennett, Louis St. Louis, F. D. Fowler, F. M. Cline, Albert F. Brundige, Samuel Baggley, and W. B. Rhodes, a Partnership Doing Business as Baggley & Rhodes; The Wear Sand Company, a Corporation, Defendants.

To the Honorable the Chief Justice, and to the Associate Justices of the Supreme Court of the State of Kansas, and to said Honorable Court:

Comes now Norman S. Wear, impleaded in this cause sub-non. The Wear Sand Company and F. D. Fowler, and respectfully represent to the Court that they are about to prosecute proceedings in error to the Supreme Court of the United States for the purpose of obtaining a review by that Court of the decision, judgment and decree of this Honorable Court in the above entitled cause; that the State of Kansas, through and by Hon. S. M. Brewster, its Attorney General, threatens to proceed and is about to proceed, as these defendants are informed and believe, in the District Court for Shawnee County, in this State, to enjoin and prohibit these defendants from procuring sand and gravel from and out of the Kansas River, where said river flows by and bounds the lands of Kaw River Sand Company, and the lands of defendant F. D. Fowler, in the County of Shawnee, in the State of Kansas and from that portion of said river which lies between the bank of said river on said lands and the thread of the stream to the North thereof and between the east and west side lines of the said lands of The Kaw River Sand Company and of F. D. Fowler; extended northwardly to the said thread of said stream; that said lands are riparian and the same lands described in the returns by the Wear Sand Company and of F. D. Fowler, as filed herein, to the Alternative Writ of Mandamus in this cause heretofore issued and defendant- are occupying said lands, including the river bank thereof and the bed of said stream within said boundaries and *is* carrying on his business of dredging and obtaining sand and gravel from the said portion of said river within said recited boundaries under authority and by consent of the said owners of said riparian lands.

147 Defendants respectfully show that should said Attorney General so enjoin defendants from the prosecution of their said calling, the business of defendants will be absolutely destroyed and defendants irreparably injured in their said calling, business and property rights. Defendants state that the right of defendants to carry on his said business at said point and in the manner he heretofore has carried on said business, without let or hindrance upon the part of the state of Kansas and without applying for and taking out a license from the Executive Council of the State of Kansas, to carry on their said business of dredging and removing sand from said river at the said points in the County of Shawnee, and without giving a bond of the nature and character demanded by said Executive Council and without paying to the State Treasurer of the State of Kansas a sum of money equal to ten per centum of the gross returns from the sale of sand dredged by defendants from said river in the course of their business operations, as demanded by said Executive Council and by said State, is the question at issue in this cause between plaintiff and defendant which is sought to be reviewed upon said recited proceedings in error.

Defendants state that said Executive Council makes said demands and requirements of defendant and said Attorney General is about to proceed in said District Court to enjoin this defendant from the said prosecution of his said business under and by virtue of the provisions of Chapter 259 of the Session Laws of the State of Kansas; that in and by the terms of said statute and in and by the terms of the Writ of Mandamus in this cause heretofore allowed by this Court and issued in due course, (reference to which said statute and writ is hereby made, it is made the duty of the State Treasurer to pay into the general revenue fund of the State all moneys received by said State Treasurer pursuant to the provisions of said Statute; that in accordance with the directions of said Statute, it will be the duty of said State Treasurer to pay over to the various drainage districts through which said Kansas River flows, one-third of the net revenue derived from sand dredged from that portion of said river within the boundaries of any such drainage district.

Defendants state that said Attorney General avers that if these defendants will make the payments of royalty demanded by said Executive Council of the State of Kansas, no proceedings will be instituted on the part of the State to enjoin defendants from carrying on his said business but, defendants respectfully represent, if defendants shall conform to the demands of said Executive Council and of the State, all moneys by them paid will be covered into the general revenue fund of the State, from which it cannot be withdrawn without an act of appropriation duly passed by the legislature of Kansas and approved by the Chief Executive of said State; that should defendants make the demanded payments the said State Treasurer will pay over a large portion of the total moneys paid in by defendants to the Drainage Board of the Drainage District in which defendant's operations are carried on, to-wit: One-third of said moneys, and there is no provision made by law by which defendant may recover said

148 moneys if the said proceedings in error in the Supreme Court of the United States shall eventuate in a decision in favor of these defendants but said moneys will be wholly lost to defendants, or defendants will be relegated to harassing and continued litigation, of doubtful result, to recover the same, which will subject defendant most unjustly to heavy cost and expense, or defendant will be compelled to abide by the extremely doubtful result of an appeal to the legislature of said State for reimbursement, the costs and expenses of which proceedings the Legislature would not feel either legally or equitably required to refund to defendant.

Defendants respectfully aver and represent that they are not justified in indulging a presumption that the State of Kansas through its Legislature or otherwise, will treat defendants equitably and fairly in the matter of refunding moneys paid out by defendant as demanded by said State, should they make such payment for that heretofore, to-wit, in the Month of May, 1915, or thereabouts, the Executive Council of the State of Kansas considered the question of what would be and constitute a fair and just royalty to be paid by defendant and those engaged in like calling on account of sand dredged from the rivers of the State of Kansas; that upon such consideration, said Executive Council fixed a just and equitable royalty at seven per centum of the gross proceeds of sales of sand so dredged; and so notified dredgers of sand from said Kansas River; that thereafter the Honorable the Governor of the State of Kansas, the Honorable the Auditor and the Honorable the Attorney General of said State, were notified of defendants' intention to exercise their legal right of appeal from the decision of this Honorable Court, in this cause, to the Supreme Court of the United States, and that thereupon another meeting of said Executive Council was called for Friday, June 11th, 1915, at which meeting the said recited action of the Executive Council, fixing the royalty at seven per centum, was rescinded and the royalty required was fixed at ten per cent instead of seven per cent, such action of the Council being taken because of defendant's said notice of his intention to take and perfect his said appeal, such action of the State by said Executive Council thus most unjustly penalizing this defendant and others similarly situated because of the exercise by this defendant of a right claimed under and guaranteed to defendant by the statutes and laws of the United States and recognized by and exercised under the laws and rules of procedure in the Courts of the State of Kansas.

Defendants represent that they are willing to duly account to the lawful authorities as required by the rules adopted by said Executive Council, for all sand and gravel dredged by them from the said Kansas River since the taking effect of said Chapter 259 of the Session Laws of Kansas, 1913, and is and at all times has been willing to make payment of all royalties payable thereunder, provided that the funds so paid are protected by special deposit or otherwise, against being absorbed by the general revenue fund pending the final disposition of this cause in the Supreme Court of the United States.

149 Defendants now here offer to give such bond as this Honorable Court may order to protect absolutely the State of Kansas in the payment to said State of all payments of such royalty due and payable to said State from these defendants, should the decision of this cause be finally against them, or offer and proposes in lieu of such bond to here now account fully and completely for all sums payable as royalty to the State of Kansas under the rules and regulations adopted in that behalf by said Executive Council, and to deposit at once the sum ascertained to be due from them respectively upon such accounting, in such depository as may be directed by the order of this Court, or with the State Treasurer of the State of Kansas, as a special deposit if this Honorable Court shall so direct, and to deposit in such depository, monthly, as and when required by said rules and regulations, the amount of royalty found payable monthly in the manner by said rules and regulations specified. And defendants pray that this Honorable Court make such order in the premises as will fairly and adequately secure to the State of Kansas ultimate payment of all such royalties should the State be found and finally determined to be entitled thereto, but will protect these defendants pending the final disposition of this cause upon appeal from the injustice of having the funds so accounted for and deposited, covered into the general revenue fund of the State and from said funds being dispersed by distribution thereof to said Drainage District Board and by payment thereof upon warrants drawn against said general revenue fund, and that the Court make such other, further orders touching and controlling such fund pending the final disposition of the said appeal, as justice to all parties and true equity in the premises may require.

NORMAN S. WEAR,
F. D. FOWLER,

Defendants.

By FRANCIS C. DOWNEY,
DENIS J. DOWNEY,

His Attorneys.

150 STATE OF KANSAS,
Shawnee County, ss:

Before me this day personally appeared Norman S. Wear, who being duly sworn, on oath states that he has read the foregoing application and that the matters and things therein set forth are true; and affiant states that the proceeding to the Supreme Court of the United States in said application is not taken for purposes of delay or otherwise than in good faith, but because affiant is advised and believes that he has just cause to complain of the judgment, decree and orders of this Supreme Court of Kansas, of which he complains in and by said proceedings in error.

N. S. WEAR.

Subscribed and sworn to before me this 21st day of June, A. D., 1915.

[SEAL.]

GEO. A. ESHE,
Notary Public.

My Commission expires on the 14 day of June, A. D., 1917.

Indorsed: Norman S. Wear & F. D. Fowler, Pl'ffs in error, The State of Kansas, Def't in error. Application for supersedeas. Filed June 22, 1915. D. A. Valentine, Clerk Sup. Ct.

151 Be it further remembered, that afterwards on Tuesday the 23rd, day of June, A. D. 1915, the same being one of the regular judicial days of the January term 1915, of the supreme court of the state of Kansas, before said court in session at the supreme court room in the city of Topeka, the following proceeding among others was had and entered of record, in the words and figures, as follows, to-wit:

152 In the Supreme Court of the State of Kansas, Tuesday, June 23rd, 1915.

No. 18985.

THE STATE OF KANSAS, ex rel. S. M. BREWSTER, Attorney General,
Plaintiff,

vs.

EARL AKERS, as State Treasurer; W. E. DAVIS, as State Auditor, et al; Norman S. Wear, Impleaded Sub. Nom. the Wear Sand Company, and F. D. Fowler, Defendants.

Order.

It appearing that an appeal has been taken in the above entitled case from the judgment of this court to the United States Supreme Court, and it further appearing that the defendants herein Norman S. Wear and F. D. Fowler, have filed their written application for an order of this court directing the proper manner of the handling of the royalties payable monthly by these defendants to the State Treasurer pending the final determination of their appeal, and the court being fully advised in the premises, it is ordered:

That the defendants Norman S. Wear and F. R. Fowler pay all Royalties due and which shall become due to the State Treasurer of the State of Kansas under monthly statements, and that all funds received by the State Treasurer from the above named defendants as royalties shall be held by said State Treasurer as its Custodian until the final determination of this litigation at which time this court will decide what disposition shall be made of such funds.

It is further ordered that no distribution or dispersal of the funds so paid to the State Treasurer by these above named defendants shall be made by the State Treasurer until the further order of this court.

153 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, clerk of the supreme court of the state of Kansas do hereby certify that the above and foregoing is a full, true complete and correct transcript of the record and proceedings in the

case of the State of Kansas, ex rel, plaintiff v. Earl Akers, etc., et al, Defendants, and also of the opinion of the court rendered therein, as the same now appears of record and remains on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this 16th day of July, 1915.

[Seal of Supreme Court State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

154 Here follows:

The original petition for a writ of error and the allowance thereof.

The original assignment of error.

The original Writ of Error.

A copy of the appeal and supersedeas Bond.

The original Citation, together with the acknowledgement of service thereof.

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Petition for Writ of Error.

To the Honorable William A. Johnson, Chief Justice of the Supreme Court of the State of Kansas, and to the Honorable Rosseau A. Burch, Henry F. Mason, Silas W. Porter, Judson S. West, John Marshall, and John S. Dawson, Associate Justices of said Court and to the Honorable the Supreme Court of the State of Kansas:

The petition of N. S. Wear and F. D. Fowler, who reside in the City of Topeka, in the County of Shawnee and State of Kansas, and who transact business as and under the trade-name of The Wear Sand Company, and of F. D. Fowler, respectfully shows:

I.

That on or about the Fifth day of August, A. D., 1913, an action or proceedings in Mandamus was commenced in the Supreme Court of the State of Kansas, by the filing of an application for an Alternative Writ, by the State of Kansas, upon the relation of Honorable John S. Dawson, Attorney General, Against Earl Akers, as State Treasurer, W. E. Davis, as State Auditor, and J. F. Schwartz doing business as the Schwartz Sand Company; The Stewart-Peck Sand Company, a corporation; The Stewart-Peck Southwestern Sand Company, a corporation; C. E. Brown; J. W. Barry, O. A. Bennett, Louis St. Louis, F. D. Fowler, F. M. Cline, Albert F. Brundige, Samuel Baggley and W. B. Rhodes, a partnership doing business as Baggley & Rhodes, and your petitioner sub. nom. "The Wear Sand Company, a corporation", as defendants. The application for the Alternative Writ of Mandamus alleged, in substance:

First. That the State of Kansas is a sovereign commonwealth admitted into the Union of States of the United States of America or

the 29th day of January, A. D., 1861, on an equal footing with the original thirteen States.

Second. That as such sovereign the State has sovereignty, ownership, dominion and control of the rivers, streams and waters within said State and of the lands underlying and beneath the same, except such as have been granted or otherwise conveyed by the United States or by said State.

Third. That the defendant Earl Akers is Treasurer of the State of Kansas, the defendant W. E. Davis is Auditor of State and the remaining defendants are persons, partnerships and corporations engaged in taking sand from the rivers which are owned and controlled by said State:

Fourth. That in said rivers and in the lands thereunder, 156 are valuable materials and commodities, among which are sand and gravel.

Fifth. That under the provisions of Chapter 259 of the Session Laws of Kansas, 1913, it became the duty of the Executive Council of the State of Kansas, to determine the terms and conditions and to fix the price at which sand and gravel (and other substances), might be taken from such rivers and said Executive Council did determine such terms and conditions and fix such price; briefly, that all persons desiring to take such sand should pay to the State the sum of ten per cent of the market value of such sand upon the river bank, which payment should be made monthly to the defendant Earl Akers, State Treasurer, the sums so paid to be turned into the general revenue fund of the State, from time to time, and account therefor to the State Auditor, who should hold said State Treasurer to account for all sums of money so by him received from such source.

Sixth. That for many years prior to the taking effect of said Chapter 259 of the Session Laws of 1913, the business of taking *sain* from said rivers had been extensively carried on by the defendants other than said Akers and Davis, and that, subsequent to the enactment of said Statute, the defendants so carrying on said business of taking sand from said streams paid to said State Treasurer, the defendant Akers, in the Month of June, 1913, sundry sums of money, aggregating Thirty-two hundred (\$3200.00) Dollars, or thereabouts, and that during the month of July, 1913, said defendants (other than the defendants Akers and Davis), paid to said Akers, as State Treasurer, further sums, aggregating about Twenty-three hundred seventy (\$2370.00) Dollars, or thereabouts, all of which said payments were made under protest, which protests, the Relator avers, were based upon pretended defects and constitutional infirmities inherent in said Chapter 259, Session Laws of Kansas, 1913.

Seventh. That by reason of such protests, the Executive Council of the State of Kansas instructed the defendant Akers to take charge of such moneys as "Custodian" and keep separate account thereof, and instructed said defendant W. E. Davis to keep a similar account and charge the State Treasurer as such "Custodian", for the moneys thus received, all of which, accordingly, has been done by said Treasurer and said Auditor; that it was the duty of said defendant,

Earl Akers, State Treasurer to cause said moneys to be deposited in the general Revenue fund of the State to be used with other moneys in that fund for paying the general expense of State government as prescribed and appropriated by the Legislature, and it became and was the duty of the State Auditor, W. E. Davis, defendant, to charge the State Treasurer with said moneys as a part of the general revenue fund, but that because of the protests of the other defendants and because of the said directions of the Executive Council the said Akers still keeps moneys in as separate fund and said Davis erroneously recognizes his right so to do.

Eighth. That in the maintenance of its government the State needs to be constantly drawing vast sums from its general revenue fund and the funds derived from sale of sand under the provisions of Chapter 259 of the Session Laws, 1913, are depended upon by plaintiff as one of its sources of income for payment of its governmental expenses; that the plaintiff has no adequate remedy at
157 law against defendants except by the Writ of Mandamus issued out of this Honorable Court, commanding the defendant State Treasurer to transfer the net proceeds of sales of sand paid in by the other defendants, (except the State Auditor), and those engaged in similar business to the general revenue fund and commanding W. E. Davis, State Auditor to manage his accounts and records in conformity therewith:

Ninth. Plaintiff refers to all of the foregoing allegations and making the same a part hereof says that all of the defendants (except said State officers), claim to have an interest in the several items of moneys paid by them to the State Treasurer and contend that on account of said protests the same should not be transferred to the general revenue fund of the State; that plaintiff is not advised of the nature of their claims or the foundation of their several protests and therefore brings them into court as necessary parties to this proceeding that they may plead their interest and be governed by the decision of this cause.

Tenth. That neither the State Treasurer or State Auditor have sufficient lawful justification for withholding said moneys from the general revenue fund of the State as against this plaintiff, and plaintiff is entitled to the Writ of Mandamus, commanding said State Treasurer and said State Auditor to transfer all of said moneys to the general revenue fund and plaintiff is entitled to judgment against the other defendants that their several protests are not sufficient in law to withhold the relief claimed by plaintiff.

And the State of Kansas prayed in its said application that a Writ of Mandamus issue commanding said Earl Akers State Treasurer to transfer the aforesaid moneys to the general revenue fund of the State, and directing W. E. Davis, State Auditor to give the State Treasurer due credit therefor and for a decree and judgment against the other defendants barring them and each of them from any interest whatever in the moneys paid in by them, respectively, as aforesaid, and for all further just, lawful and proper relief.

Petitioner avers that upon such application, the Alternative Writ was allowed by Hon. Henry S. Mason, one of the Justices of said

Supreme Court, service whereof was duly made upon the several defendants.

II.

Petitioner Further Respectfully shows that to said Writ The Wear Sand Company made its separate return, whereby it, in substance, admitted the sovereignty of the State of Kansas and its admission into the Union of States of the United States of America and that the defendants Earl Akers and W. E. Davis were, respectively, State Treasurer and State Auditor of said State of Kansas: that petitioner was then and theretofore had been engaged in the business of dredging sand from the Kansas River; that petitioner had paid to the State Treasurer the amount of money in plaintiff's petition alleged, had paid the same under protest and claimed an interest therein and then denied generally the remaining allegations of said Writ.

That in addition to the general issue, said answer tendered specific issues, in substance as follows:

(A.) That prior to January 29th, 1861, the now State of Kansas was a territory of the United States; that the defendant was the owner of certain real estate, riparian in character, bounded by the Kansas River, said river being a meandered stream; that prior to the admission of the State of Kansas into the Union of States of the United States of America, a patent had been issued by the said United States, conveying to the predecessors in title of the said answering defendant, the fee simple title to the lands bounded by said Kansas River by it respectively held and owned, describing said lands; that at the date of the granting and issue of said patent to the predecessors in title of said answering defendant, there was in force and effect in the Territory of Kansas, a statute enacting that "The Common Law of England and all statutes and Acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom, are not repugnant to or inconsistent with the constitution of the United States" and an Act entitled "An Act to Organize the Territory of Nebraska and Kansas," or any statute law which may, from time to time, be made or passed by this or any subsequent legislative assembly of the Territory of Kansas, shall be the rule of Action and Decision in this Territory, any law, custom or usage to the contrary notwithstanding"; that said Statute was in full force and effect at the date of issuance of the said patent from the United States to the predecessors in title of the answering defendant and that by the Common Law of England so adopted as the law of said Territory of Kansas, owners of land bounded by streams of the character of the said Kansas River were the owners of the bed of such stream between the side boundary lines of such lands extended to the thread of the stream; that such law was not inconsistent with or repugnant to the Act of Congress organizing the Territory of Nebraska and Kansas, or with any act of the Territorial Legislature of Kansas or with any valid enactment of the Legislature of the State of Kansas, or with the Constitution of the

United States; that said Kansas river was a non-navigable stream and defendant was the owner of the bed of the said stream to the extent to which its land abutted thereon and to the centre thread thereof, by virtue of said patent from the United States to the defendant's predecessors in title and was such owner for many years prior to the enactment of Chapter 259 of the Session Laws of 1913; that its operations in dredging sand from said river have, at all times, been confined to that portion of the bed thereof adjoining its uplands and between the bank and the thread of the main channel of said stream; that defendant paid to said State Treasurer the sum of money so paid by defendant, under protest, because the State of Kansas threatened to enjoin defendant from the exercise of its right to dredge sand from its said property and to interfere by the power of the State with the defendant's said business, whereby irreparable loss would have been suffered by defendant; that said act, Chapter 259 of the Session laws of 1913, was inapplicable to defendant because defendant (your petitioner), was the owner of said portion of the bed of said stream under grant from the United States made prior to the admission of Kansas into the Union and that to enforce the provisions of said act against defendant (your petitioner), would deprive your petitioner of its property without due process of law, would deprive it of the equal protection of the laws and of the protection of equal laws and the property of defendant (your petitioner), would be taken for public use without compensation, all contrary to the provisions of the State of Kansas and of the constitution of the United States in that behalf made and provided.

That in and by said return and as another and different issue from any theretofore thereby presented, it was alleged and shown that the Kansas River was meandered at the time of the survey of the public lands in the State of Kansas, by the United States. That said Kansas River lies entirely within the State of Kansas and flows into the Missouri River, itself a navigable water of the United States; that by Chapter 97, Session Laws of Kansas, 1864, said Kansas River was declared to be a non-navigable stream, which remained the law until an attempt to repeal the same was made by said Chapter 259, Laws 1913; that mixed and moving with the Waters of said Stream and forming no part of its bed or banks, and not formed by erosion of its bed or banks, was and is certain sand and gravel, which is fugitive in its nature and unfixed, and no person has property therein until the same has been reduced to possession; that at all times heretofore every person within the territory, and thereafter within the State of Kansas, at all times have exercised the right to reduce such sand and gravel to possession; that such right is common to all the people and to defendant (this petitioner), as one thereof, as of common right and is a property right of defendant, of which defendant (your petitioner), may not be deprived, except for public purposes and upon compensation; that said Chapter 259 of the Session Laws of Kansas, 1913, constitutes no lawful authority whereby the Executive Council of the State of Kansas may interfere with the exercise of defend-

at's (your petitioner's) right to take and remove sand from the Kansas River as heretofore he has taken it; that said Executive Council claim no other authority and there exists no other claimed authority to so interfere with defendant than as set forth in said chapter 259 of the Session Laws of Kansas, 1913, but that under the pretended authority of said chapter 259, said Executive Council, acting for and in behalf of the State of Kansas, threatens to enjoin defendant (your petitioner), from further removing sand and gravel from the bed of said river and threatens to have the agents and servants of defendant engaged in the taking of such sand arrested and prosecuted as criminals unless defendants shall pay large sums of money to said State, whereby and by reason of which, should said plaintiff cause such threatened action to be taken, defendant (your petitioner), will be deprived of its property and property rights without due process of law, the property of defendant will be taken for public purposes without compensation, defendant will be deprived of the equal protection of the laws and of the protection of the equal laws, contrary to the provisions of the Constitution of the United States and of the Constitution of the State of Kansas in that behalf made and provided.

And defendant further, and as a different and other plea from any plea in its said return theretofore set forth and pleaded and tendering a different issue from any issue in its said return theretofore tendered, set forth that theretofore the State of Kansas had instituted an action at law against defendant's co-defendant, Stewart-Peck Sand Company, which action then was pending in the District Court for Wyandotte County, in said State; that the said proceeding in the Supreme Court was an extraordinary remedy not available for the trial of title to lands; that the issues in said proceedings in mandamus were of such a character that defendant could, of right, under the provisions of the Constitution of the State of Kansas, be entitled to a jury trial thereon; that every issue of fact presented in this proceeding was presented and could be tried in said cause pending in Wyandotte County; that the Supreme Court of the State of Kansas has no jurisdiction to, in the first instance, try and determine questions of right to property; that the District Courts of the State were, by the provisions of the Constitution of Kansas, the appropriate tribunals wherein to determine questions involving property rights; that for the Supreme Court to entertain jurisdiction of this cause would deprive defendant of the equal protection of the laws and of the protection of equal laws, contrary to the provisions of the Constitution of the United States and of the Constitution of the State of Kansas in that behalf made and provided.

That in and by said answer, defendant adopted the sixth and seventh (fifth and sixth of the original return), defenses specified in the return of its co-defendant Stewart-Peck Sand Company, by the seventh whereof petitioner averred that under the provisions of Article II, Section 15 of the Constitution of the State of Kansas, all bills shall be read three separate days in each house, except in case of emergency. That said chapter 259 of the Session laws

of 1913, state of Kansas, was not read in conformity to said constitutional requirement when the same was on its passage through the House of Representatives and Senate of the State of Kansas and no emergency was declared in connection with the passage thereof; that by an amendment to said seventh subdivision

161 of said Answer, petitioner represented that the said constitution of the State of Kansas was the same constitution which had been accepted by the Congress of the United States as the basis of the admission of said State into the Union of the United States, whereby a solemn compact was entered into between said State and the United States for the benefit of all who then were subjected or in the future should be subjected to the governmental authority of said State, that the rights, privileges and immunities of those so governed should be protected as by the terms of said Constitution provided and that in subjecting your Petitioner to the provisions of said Chapter 259, enacted otherwise than as in and by said compact provided, your petitioner was deprived of a right and privilege secured to him under compact with the United States, and a right and privilege which he claimed under the United States, and in the enjoyment of which right and privilege, he claimed the protection of United States. Your petitioner further and by said seventh subdivisions of his said answer, represented that Sections 2 and 3 of said Chapter 259 attempted to confer legislative and judicial power upon the Executive Council of the State of Kansas, a purely administrative body, before which no hearings are provided for and no provision is made permitting persons affected thereby in their personal or property rights to appear and defend such interests and that by Sections One and Six of said Act the property of Your petitioner is attempted to be confiscated to the State without compensation and Your petitioner is compelled to pay tribute to the State of Kansas for the privilege of utilizing his property in a manner wholly lawful otherwise than by the provision of said Chapter 259, whereby your petitioner is deprived of a natural right and, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States is deprived of his property without compensation and without due process of law, and of the equal protection of the law and of the protection of equal laws; and petitioner further averred that the Supreme Court of the State of Kansas should not take jurisdiction of the application for the writ of mandamus in view of the conflicting claims of the parties plaintiff and defendant; that said claims should, of right, be heard and determined in a court of adequate jurisdiction and by a jury, in due course of orderly procedure, to all of which your petitioner was entitled under the laws of the land.

III.

Your petitioner respectfully represents that upon the coming in of Your petitioner's answer, the State moved to quash the same and for judgment in its favor, which motion was sustained and thereafter your petitioner filed a motion for rehearing, which was

by the Court overruled, and on or about the — day of July, A. D. 1914, a final judgment awarding issue of the peremptory writ was entered in said cause.

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IV.

Upon the hearing had before the said Supreme Court of the State of Kansas, in said motion to quash, and upon all hearings on motions and proceedings thereafter. Your petitioner insisted and argued and asked that his claims as specified in his said answer and as above in substance set forth, should be recognized and adjudicated in his favor and declared valid in law upon the facts as stated by the pleadings and as admitted by the motion to quash your petitioner's return, but all of your petitioner's objections, applications and claims were overruled by said Supreme Court and your petitioner argued before said court especially that he was entitled to a hearing before a jury of all matters of fact pleaded in his said answer and which controverted and denied the matters of fact specified in the alternative writ, and your petitioner claimed the protection and benefit of the contract between the United States and the State of Kansas as evidenced by the said above recited provisions of the Constitution of the State, relative to the passage of laws through the houses of the legislature of said State.

The decision and rulings of said Supreme Court denied to your petitioner a title, right, privilege and immunity held and claimed by your petitioner, under the Constitution and laws of the United States, deprived your petitioner of his property without due process of law; authorized the taking of your petitioner's property for public use and purposes without a compensation, and deprived your petitioner of the equal protection of the laws and of the protection of equal laws, all contrary to the said provisions of the Constitution of the United States and to the Provisions of the Fourteenth amendment thereof.

Wherefore, your petitioner prays that a writ of error may issue and that he may be allowed to bring up for review before the Supreme Court of the United States the said orders and judgment of the Supreme Court of the State of Kansas, said Supreme Court being the highest Court and Court of last resort in said State, and that your petitioner may have such further and other relief in the premises as may be just.

NORMAN S. WEAR,

Impleaded Sub. Nom. The Wear Sand Company.

F. D. FOWLER.

FRANCIS C. DOWNEY,

DENIS J. DOWNEY,

Petitioner's Attorneys.

403-7 Lathrop Building, Kansas City, Missouri.

FRANCIS C. DOWNEY,

Of Counsel.

163 STATE OF KANSAS,
Shawnee County, ss:

N. S. Wear, being duly sworn, deposes and says I am the foregoing petitioner; that to my own knowledge, the matters therein related are true except as to matters therein stated to be on information and belief and as to such matters, I believe the same to be true.

N. S. WEAR.

Sworn to before me this 21st day of June, A. D. 1915.

[Seal Geo. A. Eshe, Notary Public, Shawnee County, Kans.]

GEO. A. ESHE,
Notary Public in and for Shawnee County, Kansas.

Commission expires June 14, 1917.

Read on application for writ of Error, June 21st, A. D. 1915.

W. A. JOHNSTON,
Chief Justice, Supreme Court, State of Kansas.

Writ allowed this 21st day of June, 1915.

W. A. JOHNSTON,
Chief Justice.

164 In the Supreme Court of the United States.

NORMAN S. WEAR, Impleaded Sub. Nom. The Wear Sand Company,
 and F. D. Fowler, Plaintiffs in Error,

vs.

THE STATE OF KANSAS ex Rel. S. M. BREWSTER, Attorney General,
 Defendant in Error.

Assignment of Errors.

Come now Norman S. Wear, impleaded sub. nom. The Wear Sand Company, plaintiff in error, and F. D. Fowler, and make and file this, their assignment of Error.

First. The Supreme Court of Kansas erred in ruling and adjudging that the Common law of England governing the title to the beds of non-tidal streams, as such law existed prior to the Fourth Year of James the First, was not the law of the organized Territory of Kansas in the year 1859.

Second. The Supreme Court of Kansas erred in ruling and deciding, upon the pleadings and without evidence, that the Kansas River was a navigable stream in the year A. D. 1859.

Third. The Supreme Court of Kansas erred in ruling and deciding that the United States did not have authority to vest in patentees of lands of the National domain bounded by non-tidal streams, the title to the bed of the stream, opposite to the banks thereof included within the grant.

Fourth. The Supreme Court of Kansas erred in ruling and deciding that patents from the United States granting lands bounded by the Kansas River, when such patents issued prior to January 29th, 1861, did not vest title in the patentee to the bed of the stream to the centre of the main channel thereof.

Fifth. The Supreme Court of Kansas erred in ruling and deciding that under the Common Law, adopted by statute as a part of the law of the State of Kansas, a prescriptive right could not arise against the State.

165 Sixth. The Supreme Court of Kansas erred in ruling and deciding that under the treaty of 1854 between the United States and the Shawnee Indians, and the treaty of January, 1855, between the United States and the Wyandotte Indians, the individual members of said tribes to whom were allotted lands bounded by the Kansas River, did not take title to the centre of the channel.

Seventh. The Supreme Court of Kansas erred in ruling and adjudging that defendant was not deprived of the equal protection of the laws and of the protection of equal laws by the manner in which Chapter 259 of the laws of Kansas 1913, was adopted by the Kansas Legislature.

Eighth. The Supreme Court of Kansas erred in ruling and adjudging that sands having no fixed situs and in constant motion, mixed with the waters of the streams of Kansas and which sands were not the product of erosion or attrition of its bed or banks are property of the State of Kansas in a proprietary sense and in such sense as to be saleable by it in their natural condition, for the benefit of its general treasury.

Ninth. The Supreme Court of Kansas erred in ruling and adjudging that the State of Kansas has such a proprietary right in the bed of the Kansas River and in the beds of all streams within the State which were meandered in course of the public surveys, that said State may sell the subaqueous portion of the bed for its own aggrandizement.

Tenth. The Supreme Court of Kansas erred in ruling and adjudging that the provisions of Chapter 259 of the Session Laws of Kansas, 1913 are applicable to plaintiff in error and to others similarly situated, under the pleadings in this cause.

Eleventh. The Supreme Court of Kansas erred in sustaining the motion of the State to quash the return of the plaintiff in error to the alternative writ in this cause issued.

Twelfth. The Supreme Court of Kansas erred in rendering judgment upon the pleadings in this cause against plaintiff in error.

Thirteenth. The Supreme Court of Kansas erred in overruling the motion of plaintiff in error for a rehearing of this cause.

FRANCIS C. DOWNEY,
DENIS J. DOWNEY,
Attorneys for Plaintiffs in Error.

Lathrop Building, Kansas City, Mo.

Read on application for writ of error, June 21st A. D. 1915.

W. A. JOHNSTON,
Chief Justice, Supreme Court of Kansas.

166 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, 88:

The President of the United States of America to the Honorable the Judge of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Kansas, ex rel. John S. Dawson, Attorney General, and Earl Akers, as State Treasurer of the State of Kansas, W. E. Davis, as State Auditor, and F. J. Schwartz, doing business as the Schwartz Sand Company; The Stewart-Peck Southwestern Sand Company, a Corporation; The Stewart-Peck Sand Company, a Corporation; The Wear Sand Company, a Corporation; C. E. Brown; J. W. Barry; O. A. Bennett; Louis St. Louis; F. D. Fowler; F. M. Cline; Albert F. Brundige; Samuel Baggleley; and W. B. Rhodes, a Partnership doing business as Baggleley & Rhodes, Wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said Norman S. Wear, impleaded sub. nom. The Wear Sand Company and F. D. Fowler, as by their complaint appears.

167 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the twentieth day of July next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said

Supreme Court, the twenty-first day of June, in the year of our Lord One-thousand nine-hundred and fifteen.

[Seal of District Court U. S., District of Kansas.]

MORTON ALBAUGH,
*Clerk of the United States District Court
in and for the District of Kansas.*

Allowed by

W. A. JOHNSTON,
*Chief Justice of the Supreme
Court of the State of Kansas,
on the 21st Day of June,
A. D. 1915.*

168 In the Supreme Court of the State of Kansas.

NORMAN S. WEAR, Impleaded Sub. Nom. The Wear Sand Com-
pany, and F. D. Fowler, Plaintiffs in Error,

vs.

THE STATE OF KANSAS, Defendant in Error.

Bond.

Know all men by these presents that we, Norman S. Wear, and F. D. Fowler, as principals and David Bowie and F. P. Elmore as sureties, are held and firmly bound unto the State of Kansas in the sum of One Thousand Dollars, to be paid to the said the State of Kansas, for the payment of which well and truly to be made, we bind ourselves and each of us and our and each of our heirs, executors and administrators, and the successors and assigns of the corporate parties to this bond, jointly and severally firmly by these presents. Sealed with our seals and dated the 21st day of June in the year of our Lord, One-thousand nine-hundred and fifteen.

Whereas, the above named Norman S. Wear and F. D. Fowler have prosecuted a proceeding in error to the Supreme Court of the United States to reverse the decree and judgment rendered in the above entitled cause, by the Supreme Court of the State of Kansas:

Now, therefore, the condition of this obligation is such, that if the above named Norman S. Wear and F. D. Fowler shall prosecute said proceeding in error to effect, and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NORMAN S. WEAR.
F. D. FOWLER.

DAVID BOWIE.
F. P. ELMORE.

Sealed and delivered, and taken and acknowledged this 22d day of June, A. D. 1915.

D. A. VALENTINE,
*Clerk of the Supreme Court
of the State of Kansas.*

Approved by

W. A. JOHNSTON,
*Chief Justice of the Supreme
Court of the State of Kansas.*

Endorsed: 18985. Norman S. Wear and F. D. Fowler, Plaintiffs in error, vs. The State of Kansas, Defendant in Error. Bond. Filed Jun- 22, 1915. D. A. Valentine, Clerk Supreme Court.

169 UNITED STATES OF AMERICA, ss:

To the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Supreme Court, at Washington, D. C., wherein Norman S. Wear, impleaded sub. nom. The Wear Sand Company and F. D. Fowler, are Plaintiffs in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, this the 22nd day of June, A. D., One-thousand nine-hundred and fifteen.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

Attest:

D. A. VALENTINE,
Clerk Supreme Court.

Service of the foregoing citation is hereby acknowledged and accepted, and formal service of the same is hereby waived, this June 22nd, A. D. 1915.

S. M. BREWSTER,
Attorney General of the State of Kansas.

170 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, clerk of the supreme court of the state of Kansas do hereby certify that there was lodged with me as such clerk on

June 21st, 1915, in the case of the State of Kansas, ex rel. plaintiff versus Earl Akers, State Treasurer etc. et al., Defendants,

1. The original Bond of which a copy is herein set forth.

2. Two copies of the Writ of error as herein set forth, one for the defendant in error, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, this 16th day of July, A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

171 UNITED STATES OF AMERICA, *ss:*

Supreme Court of Kansas.

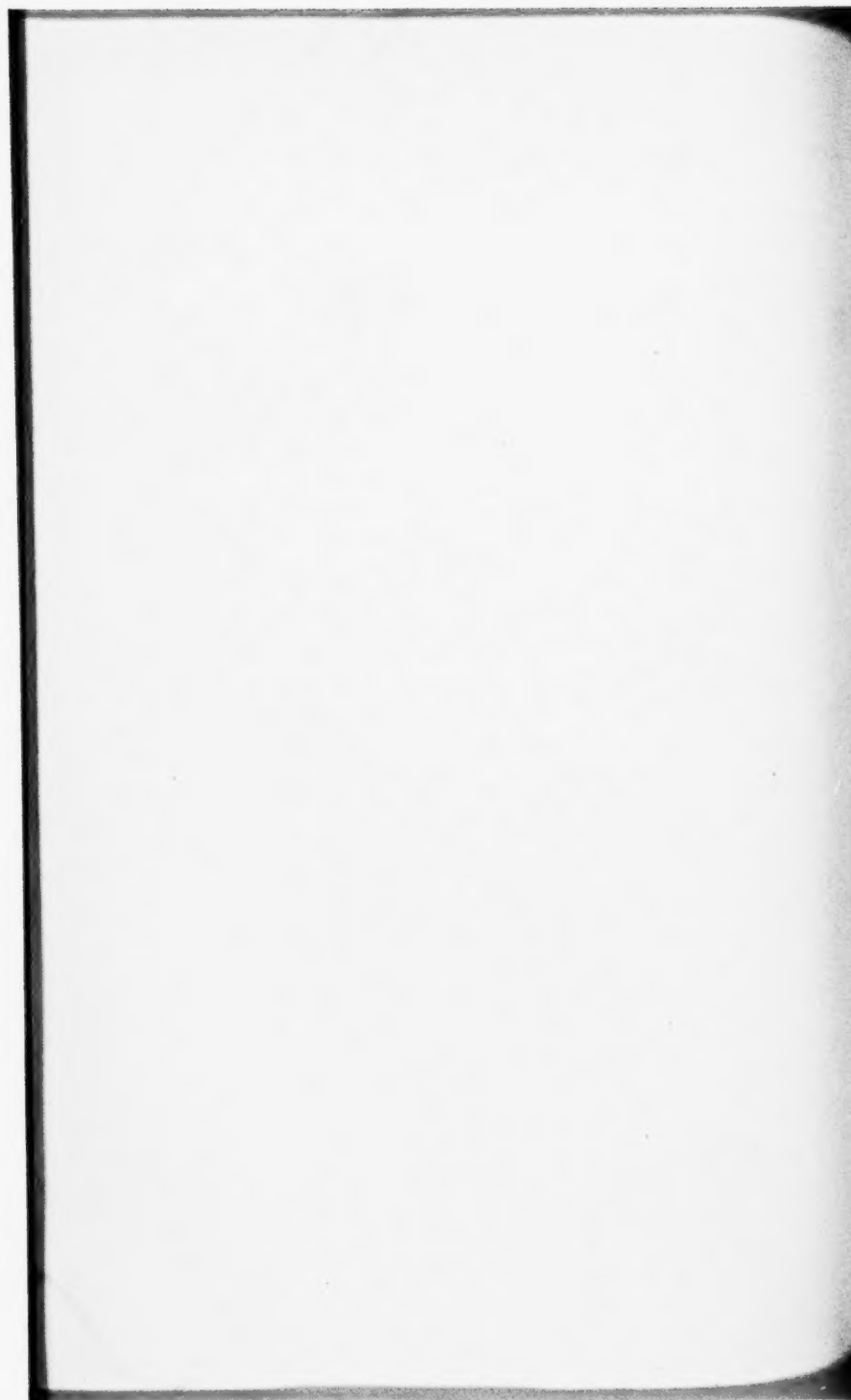
In obedience to the commands of the within writ, I herewith transmit to the supreme court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas in the city of Topeka, this 16th day of July, A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 24854. Kansas Supreme Court. Term No. 201. Norman S. Wear, impleaded sub. nom. The Wear Sand Company, and F. D. Fowler, plaintiffs in error, vs. The State of Kansas ex rel. S. M. Brewster, Attorney General. Filed July 26, 1915. File No. 24854.



FILED
NOV 9 1917
JAMES D. HANER,
CLERK.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1917.

NORMAN S. WEAR, Impleaded sub nom. THE
WEAR SAND COMPANY, and F. D.
FOWLER,

Plaintiffs in Error,

v.

No. ~~111~~ 30

THE STATE OF KANSAS, ex rel. S. M.
BREWSTER, Attorney General,

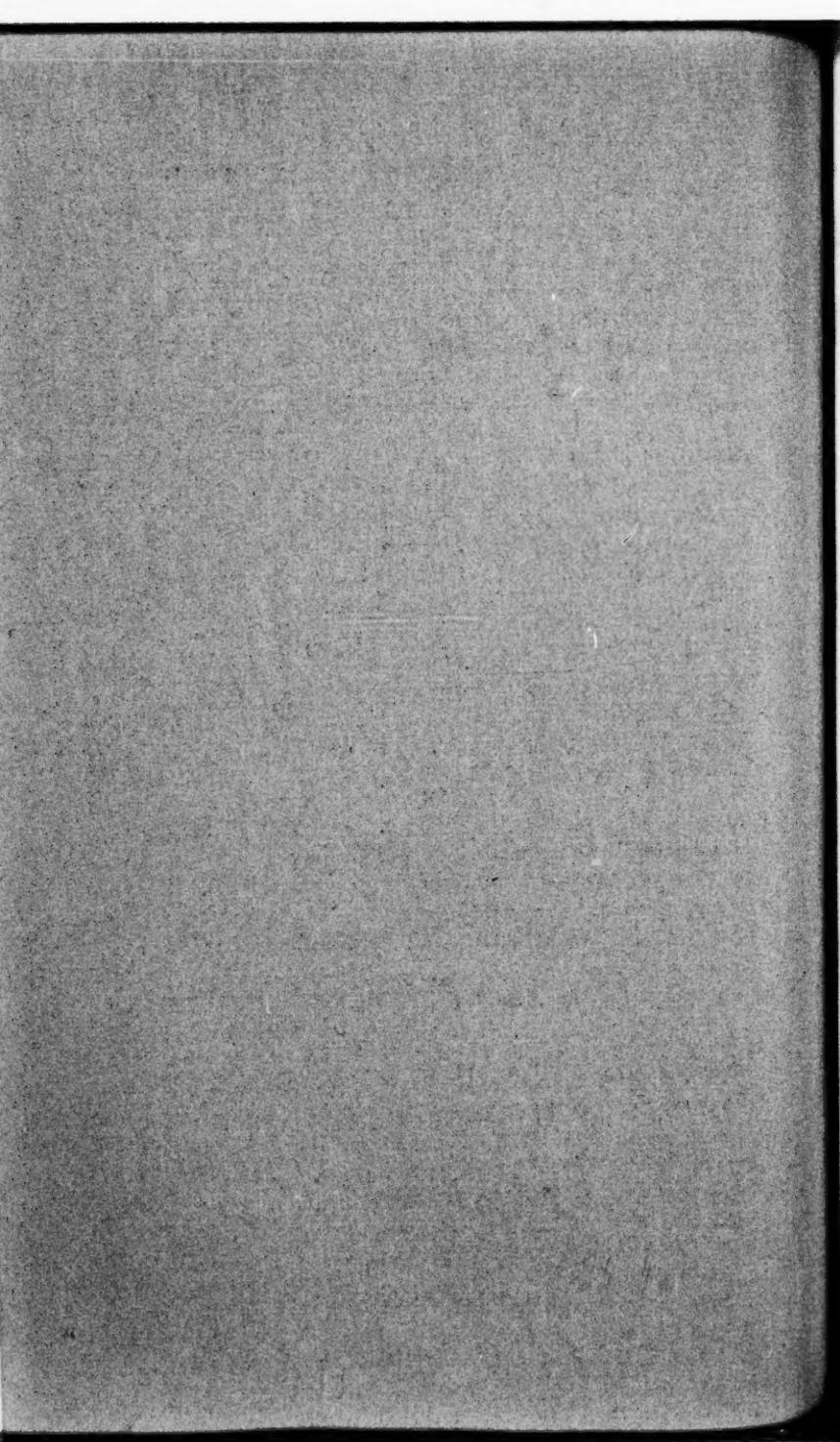
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Brief for Plaintiffs in Error

FRANCIS C. DOWNEY,
ARMWELL L. COOPER,
DENIS J. DOWNEY,

Attorneys for Plaintiff in Error.



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POINTS AND AUTHORITIES.

The common law rule relating to riparian rights was the law of Kansas Territory at the date the title to Lot 5, Section 30, Tp. 11, R. 16, East 6th P. M. passed from the United States Government to George Gardener.

Stat. Kan. Terr., Ch 96, Sec. 1, p. 469;
 Kans. Stat. 1859, Ch. 121, p. 615, Sec. 1;
 Const. Kans. Sec. 4, Schedule. Gen. Stat. Kans.,
 1915, Sec. 266 (Adopted July 29, 1859).

Such continued to be the law after the admission of Kansas into the Union, and, until 1868.

Comp. Laws, Ks., 1862, pp. 81-82;
Clark v. Allaman, 71 Kans., 206.

Under the Common law of England, the title to the beds of all fresh water streams, whether capable of navigation in fact or not, was vested in the owners of the adjoining uplands.

U. S. v. Mackey, 214 Fed. 137;
Wood v. Folwer, 26, Kans. 682;
 Kents Comm. Vol. 3, p. 428;
McCullough v. Wall, 4 Richardson, (l. c.) 84;
State v. Pacific Guano Co., 22 S. C., 55 (l. c.);
Palmer v. Mulligan, 3 Caines (N. Y.) l. c. 319;
Hale De Jure Maris (Hargrave's L. Tr., 9);
Lorman v. Benson, 5 Mich. 18.

It has always been the policy of the United States to grant with the adjoining uplands the beds of non-navigable streams bounding the same.

Sec. 9, Ch. 29, 4 Cong. 1st Sess., 1786;
 Sec. 5, Ch. 35, Sess. 1, 8th Cong., 184.

Whether a stream is navigable is a question of fact, the burden of proving which rests on the party asserting it.

Ligare v. C. M. & N. W. Ry., 166 Ill., 249;
People v. Economy Power Co., 241, Ill., 1. c. 333.

A Territory of the United States, authorized by act of Congress to extend its power of legislation to all rightful subjects of legislation has all powers of a sovereign state limited only by negative provisions (if any) of the creative act, and can legislate validly and effectively on the vesting and transmission of titles to lands within its borders.

Hornbuckle and Toombs, 85 U. S., 655, 1. c. 655-56;
 Cooley's Prin. Const. Law (Student's Series) pp. 182-3-4-5;
Terr. of Dakota ex rel. McMahon v. O'Connor, 3 L. R. A., 355;
Trustees of Vincennes Univ. v. Indiana, 14 How. (U. S.), 268;
Clinton v. Englebrecht, 80 U. S., 1. c. 441.

Judicial notice cannot be taken of navigability where such navigability is open to question.

U. S. v. Rio Grande Dam and Irr. Co., 174 U. S., 1. c. 698;
Donnelly v. U. S., 228 U. S., 243-262;
The Daniel Ball, 10 Wall., 577;
The Montello, 20 Wall., 430 (1. c. 441);
Leovy v. U. S., 177 U. S., 621.

Navigability *vel non* is purely a question of fact.

Harrison v. Fite, 148 Fed., 781-83-84;
The Montello, 11 Wall., 411-414-415;
The Montello, 11 Wall., 611-414-416;
Donnelly v. United States, 228 U. S., 708 (1. c. 709);
The Daniel Ball, 10 Wall., 577;
Leovy v. United States, 177 U. S., 621-32;
U. S. v. Rio G. Dam and Irr. Co., 174 U. S., 690 (1. c. 699);
U. S. v. Mackay, U. S., C. C. A., 216, Fed., 126.

The inquiry as to navigability should be confined to the time of issue of the patent. That vital changes take place in the character of streams is well recognized by the courts.

Harrison v. Fite, *supra* (cited in *Kregar v. Fogarty*, 78 Kans., l. c. 545);
Dana v. Hurst, 86 Kans., 947-948 (l. c.).

The meandering of streams and bodies of water in the course of the making of the Public Surveys, is an official regulation merely, and does not determine the navigability or non-navigability of the stream.

Manual of Surveying Instructions 1890;
Case of Fuhrer, 12 L. D., 556;
Case of Smith, 18 L. D., 135-136;
Keane v. Calumet Canal Co., 190 U. S., 452-459;
Iowa v. Rood, 187 U. S., 87-93;
Harrison v. Fite, 148 Fed., 781-784;
Ross v. Faust, 54 Ind., 471;
Kregar v. Fogarty, 78 Kans., l. c. 546.

The State has no right in absolute property in moving sands mixed with the waters of a stream within her borders. Sands so situated are, by analogy, in the nature of things *ferae naturae*, to which an individual can obtain title as against all the world.

State v. Repp., 104 Ia., 305;
State v. Rodman, 58 Minn., 393;
Rosmiller v. State, 58 L. R. A., 97;
Behring Sea Arbitrator's Lec. 23 Am. Law Reg., 92;
Blades v. Higgs, 11 H. L. Cas., 621;
Sutton v. Moody, 1 Ld. Raymond, 250;
Long Point Co. v. Anderson, 19 Ont., 487;
Churchward v. Studdy, 14 Rast., 249;
Manning v. Mitcherson, 60 Ga., 447;
Fleet v. Hegeman, 14 Wend. (N. Y.), 42;
Gehn v. Rich, 8 Fed., 159;

Case of the Swans, 7 Coke., 18a; 2 Bl. Comm., 391-403;
Taber v. Jenny, 1 Sprague (U. S.), 315;
Hampdon v. Kiry, 68 N. Y., 459;
Church v. Meeker, 34 Conn., 421;
Peck v. Lockwood, 5 Day, 22;
Mather v. Chapman, 40 Conn., 382;
Nudd v. Hobbs, 17 N. H., 527;
Hill v. Lord, 48 Me., 83-100;
Anthony v. Gifford, 2 Allen, 549;
Locke Gov't, Ch., 5;
Pothier, Traite du Droit de Propriete, No. 2;
Kidd v. Laird, 15 Cal., 179;
Liggins v. Inge, 7 Bing., 682, l. c. 692-93;
Kinney Irr. & Water Rights, Vol. 1, 467.
Rosmiller v. State, 58 L. R. A., 97;

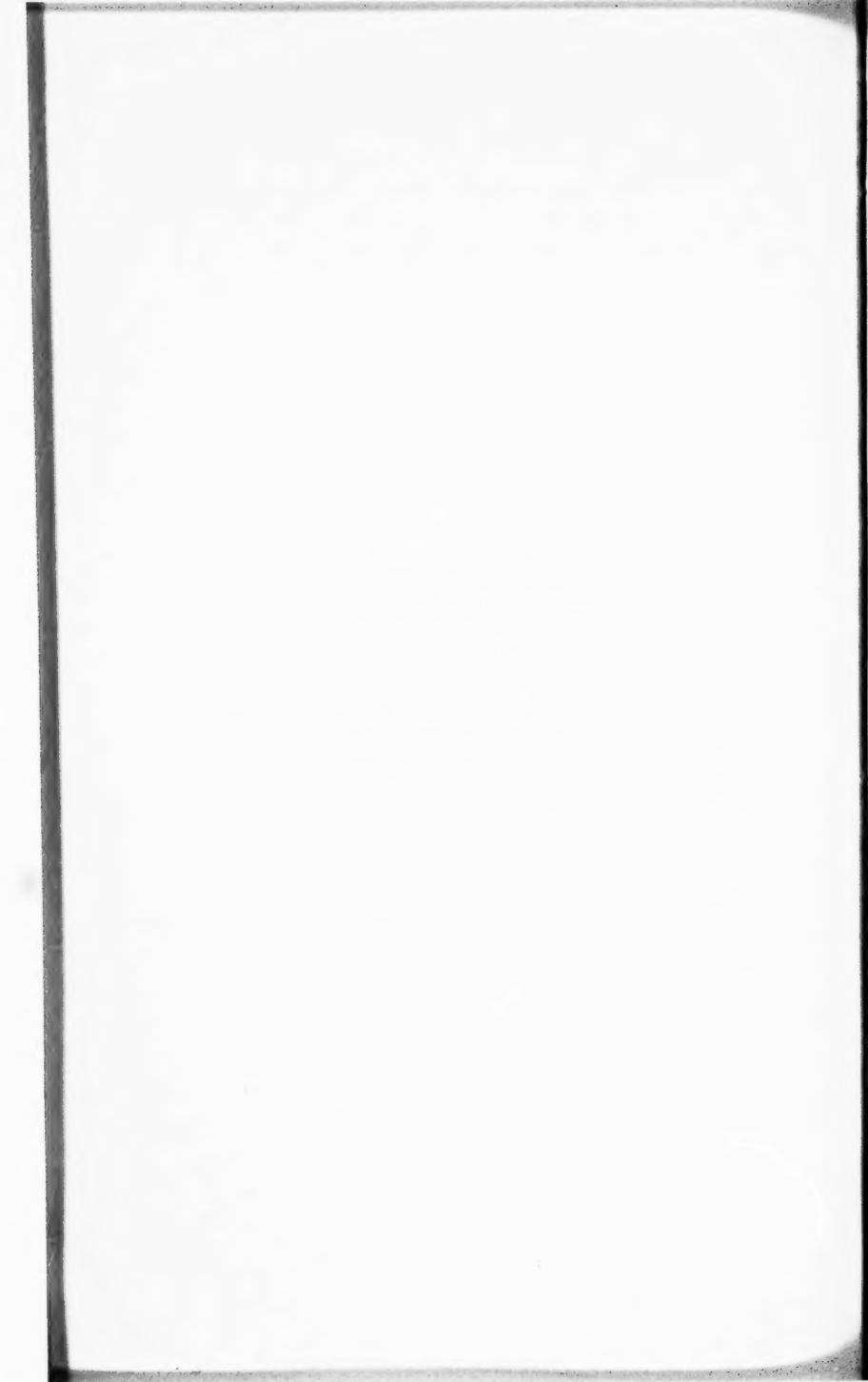
The estate of the State in things of the nature of water, etc., is a trust estate only, and not a property right absolute, or in propriety of which it can dispose at will for the enrichment of its general treasury.

Markin v. Waddell, 16 Pet. (U. S.), 366;
Arnold v. Mundy, 6 N. J. L., 1;
Smith v. Maryland, 18 How., 74-75;
I. C. Central Rld. v. Illinois, 146 U. S., 456;
Den ex. dem. Russel v. New Jersey Co., 15 How., 456;
Gaugh v. Bell, 21 N. J. L., 156;
Shively v. Bowlby, 152 U. S., 1;
Morris v. U. S., 174, U. S., 196;
U. S. v. Morris, 23 Washington Law Reporter, 745;
Coxe v. State, 144 N. Y., 406;
Exch. B. & A., Southton, Chas. I, 42;
Sir John Constable's Case, Anderson, 86;
Landsdowne M. S., 105;
Exch. O. R., Mem., 7, 14 Eliz., 97;
Hale, De Jure Maris, Ch. 2;
Hardin v. Jordon, 140 U. S., 371;
Stockton v. Balt. & N. Y. Ry. Co., 32 Fed. 9;

- Oakland v. Oakland Water Front Co.*, 118 Calif., 210;
Ball v. Herbert, 3 Term. Rep., 261;
Collis on Sewers, 55-74;
Littleton's Year Book, 8th Ed., 4-18-19.

Prescriptive rights might, at common law, be obtained against the State.

- Hale*, Admiralty Jurisdiction (Hargrave N. S., 93 fo. 222);
Hale, Cap. Primum;
Hale, Cap. Quintim II;
Hale, *De Jure Maris*, Cap. II, Par. 1;
Hale, *De Jure Maris*, Chapt. V, Par. 2;
Sultash v. Goodman, L. R. 7, Q. B. Div., 106;
Orford v. Richardson, 4 T. R., 437;
Carter v. Murcat, 4 Burr., 2162;
Lord Advocate v. Lovat, L. R., 5 App., Cas., 288;
Gould on Waters, 3rd Ed., pp. 48-49, Sec. 22;
Re Belfast Dock, 1 Ir. Rep., Eq., 128;
Re Alston's Estate, 13 R. L., 200, 206;
LeStrange v. Rowe, 4 F. & F., 1048;
Healey v. Thorne, Ir. Rep., 4 C. L., 495;
Neill v. Devonshire, 8 A C., 153-70;
Little v. Wingfield, 8 Ir. C. L., 279;
Yard v. Ocean Beach, Ass'n, 49 N. J. Eq., 306;
Chabert v. Russell, 109 Mich., 571;
Strange v. Spalding, 29 S. W. (Ky.), 137;
Lambert v. Stees, 47 Minn., 141;
Mare Clausum, Selden, Ch. 22-24;
1 Bacon's Abridg., 640;
Coke on Littleton, 107a, 260a;
Gould on Waters, 3rd Ed., Sec. 22;
Washburn on Real Property, 6th Ed., Vol. II, p. 297.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

NORMAN S. WEAR, Impleaded sub nom. THE
WEAR SAND COMPANY, and F. D.
FOWLER,

Plaintiffs in Error,

v.

No. 201.

THE STATE OF KANSAS, *ex rel.* S. M.
BREWSTER, Attorney General,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Brief for Plaintiffs in Error

STATEMENT.

For many years prior to the 15th day of March, 1913, a number of persons, co-partnerships and corporations, inclusive of plaintiffs in error, had been engaged in the business or calling of dredging and removing sand and

gravel from the beds of the several streams in Kansas, including the Kansas and Arkansas Rivers, without question from any source as to their right so to do. The material so dredged found sale at an advance over the cost of production, such advance constituting the profit of those engaged in the business. The plaintiffs in error occupied adjoining tracts of land within the limits of the city of Topeka, which tracts were bounded on the north by the Kansas River. The operations of plaintiffs in error were carried on upon and in the river adjoining the tracts occupied by them severally, within that portion of the river lying south of the centre of the main current and within the side lines of their respective holdings extended northerly to such centre line of main current.

The Kansas (or Kaw) River is a typical fresh water stream of the plains; lies wholly within the State of Kansas, and its sole source of water supply is the rain fall and melting snows over a drainage area of some 36,000 square miles of prairie country. While the precipitation is seasonal, it is variable in quantity, uncertain as to locality and unreliable as to periodicity, the semi-arid area of the plains of Western Kansas furnishing a large proportion of its watershed. Frequently one or more of its tributary streams may be at high flood, while the main body of the river and also its other tributaries, remain practically undisturbed. Again the main stream may in some section of its course be swollen with flood waters while its main tributaries, or one or more of them, and the remaining portion of the main stream remain unaffected. These periods of flood are, as a rule, of short duration, being measured by few days, sometimes even by hours, very variable in volume and of uncertain recurrence. The stream is spanned by many fixed bridges from its mouth

to its source and is, and since 1864 has been, permanently obstructed by a dam situated at Lawrence about 40 miles above its connection with the Missouri.

Throughout its course, except where, in places, stratified rock rises to the surface, the river bed consists of huge deposits of loose and shifting sands which absorb, and transmit laterally, a very large proportion of the waters reaching the river from the surface of the surrounding lands and through its tributaries. The river was meandered at the time of the making of the government surveys of the public lands, at which time the reservations of several Indian tribes, (the Wyandottes, Shawnees, Delawares and others of importance) were located on opposite sides of the stream for many miles from its mouth, westwardly, within the boundaries of the then Territory of Kansas.

On the first day of October, 1860, the United States issued to George Gardner their patent for Lot 5, Section 30, Township 11, Range 16 E., Kansas Territory, based upon a land warrant levied some time prior thereto. The tracts of land occupied by Wear and Fowler are held under this title, Wear holding a portion thereof in fee and Fowler by lease from H. C. Root, the fee owner. Kansas was admitted as a State January 29th, 1861.

On the 15th day of March, 1913, there was approved a certain enactment of the Kansas Legislature, which since has become popularly known as the "Sand Law," being Chapter 259 of the Session Laws of Kansas, 1913, a copy of which, marked "A," is attached to this brief for convenient reference by the court.

By Section 6 of this Act "the bed and channel of any river in this State, or bordering on this State to the middle of the main channel thereof," is declared to be the property of the State, "unless this State, or the *United States*, has

granted or conveyed an adverse legal or equitable interest therein since (*sic.*) January 29th, 1861 A. D., or unless there still exists a legal adverse interest therein, founded upon a valid grant prior thereto; provided, that nothing in this act shall affect or impair the rights of any riparian land owner," etc. The administration of the Statute devolved upon the Executive Council of the State, consisting of the Governor, Secretary of State, Attorney General, State Treasurer, Superintendent of Public Instruction, and the State Auditor.

After publication of this enactment, the State, through its executive council and regardless of vested property rights, required of the various persons, individual and corporate, then engaged in dredging sand from the several streams of Kansas, payment of royalties determined as to amount, as by the terms of the Statute provided and threatened, in case of refusal, to enjoin the further prosecution of their dredging activities and to prosecute and punish, criminally, such persons and their employes engaged in the work; and this without exception as to location or size or character of the stream. To permit the State to take such a course spelled destruction to the business of those engaged in it, and they made the payment required; under protest, however, denying the constitutionality of the act, denying the right of the State, under any provision of the law, to require such payment from them and claiming protection of the Constitution and laws of the United States as to its enforcement against them.

Upon the fifth day of August, 1913, the State of Kansas, on the relation of John S. Dawson, its Attorney General, with the avowed purpose of obtaining for the use of the general fund of the state the moneys paid in by the several defendants, but in reality to determine legally the

ownership of the beds of the streams throughout Kansas, made application to the Supreme Court of the State, for a writ of mandamus, directed to the State Treasurer and State Auditor (Transcript, pp. 2 to 6, inclusive), requiring those officers to show cause why they should not turn into the general revenue fund of the State the moneys paid in, under protest, by the various operators in the production of sand and gravel; the application setting forth, among other things, that "as a sovereign commonwealth, the State of Kansas, plaintiff herein, has sovereignty, *ownership*, dominion and control of the *rivers, streams and waters* within said State and of the *lands underlying such rivers, streams and waters*, except such rivers, streams and waters and the lands underlying and beneath the same as have been *patented, granted, or otherwise conveyed by the United States of America* or by this plaintiff, and that the sands, etc., in such rivers, streams and waters, *belong to the State*. (Italics are Counsel's.) The application then, in substance, (Transcript, page 4), further alleges that the Executive Council instructed the Treasurer to take charge, as custodian, of the moneys paid in by the defendants, under protest, and hold the same in a separate fund to be known as "the River Fund," which the State Treasurer, accordingly, did. There is no recital of the powers and duties of the "Executive Council," nor does it anywhere appear in the application that such body ever required the State Treasurer to pay the moneys in the "River Fund" into the general revenue fund of the State. The members of the Executive Council, either in person or officially, are not made parties to the action and the powers of that body are not touched upon in the entire proceeding, so that, but for the general allegation contained in paragraph "Seventh" of the application, to the effect that it was the duty of the Treasurer to pay said moneys into the general revenue fund, there

would be absolutely nothing upon which to base a conclusion that the Treasurer and Auditor were not strictly within their legal duties in complying with the directions of the Executive Counsel in maintaining the "River Fund." The application then proceeds to aver that the defendants, other than Akers, the Treasurer, and Davis, the Auditor, claim "an interest in the several items of money paid by them to the State Treasurer" * * * and plaintiff brings them into court as *necessary and proper parties* to this proceeding that they may be advised thereof and *plead their interest and be governed by the decision in this case.* [Italics Counsel's, (Trans., p. 5, Par. Ninth.)]

It is especially noticeable that nowhere in the petition is there an allegation to the effect that any of the defendants, are engaged in taking sand from streams or portions thereof, the beds of which have not been granted by the United States or by the State, nor does the petition contain any equivalent allegation. If such a claim on the part of the state is to be gathered at all from the petition, it is by merest inference.

The prayer, having asked issue of the writ against Akers and Davis, proceeds: "and for a judgment against the other defendants, *barring them and each of them, from any and all claim, right or interest whatsoever in the moneys aforesaid heretofore paid in by them,*" and for general relief.

One of the defendants, Stewart-Peck Sand Company, is not a party to the proceeding in this Court, but as the case was argued generally upon the answer of that defendant and as a part of its answer is adopted by the plaintiffs in error, (Fowler, Trans., p. 22; Wear, Trans., p. 17), the answer of such defendant is included in the transcript (with the explanation that the answer of Stewart-Peck Sand Company having been amended [Trans., p. 23], the 5th and 6th

counts originally adopted by Wear and Fowler, become the 6th and 7th counts of the amended answer of that defendant [see Trans., p. 117, last paragraph]).

The answers of all defendants tender the general issue, thus raising squarely, as a fact to be determined, the claimed proprietorship, by the State, of the beds and channels of the streams and the ownership of the waters of the State. The supplemental answer of the plaintiff in error, Fowler, specifically tenders the issue of non-navigability of the Kansas River (Trans., p. 50), while both Wear and Fowler claim absolute ownership of the river bed in front of their respective holdings, (Trans., pp. 10, 21), and of the material dredged therefrom.

The plaintiffs in error, in addition to the general issue, severally plead the adoption of the common law of England by Statute of the Territory of Kansas; the continuation thereof as the law of the State of Kansas until 1868; the issue by the United States of the Gardner patent while such law was still in force, and that by Chapter 97, Session Laws of Kansas, 1864, the State recognized the non-navigability of the Kansas River (Trans., p. 12), this allegation being adopted by Fowler, by way of reference (Trans., p. 22). They further plead the pendency of an action at law, in a State Court of general and competent jurisdiction, in which all matters of fact pleaded in this (mandamus) proceeding are at issue, and may be determined, in due course, in the manner provided by law for the determination of questions of fact; and that the proceeding in mandamus is not a proceeding provided by the laws of Kansas for the trial of fact affecting rights to property; that defendants (plaintiffs in error) have a right to trial of the questions at issue before a competent tribunal in ordinary course of law; "that this (Supreme Court of Kansas), is without jurisdiction to entertain and determine, in the first instance,

questions of right to property" and pray that the cause be remitted to the proper tribunal having authority to hear and determine the facts in cases of conflicting claims to property. There are other special issues tendered, but Counsel is of opinion that the decision on the questions here presented must be determinative of all questions which may properly be submitted to this Court at this time.

The State, upon the coming in of the several answers, or returns, (original and amended), to the writ, moved to quash such returns, a proceeding which, under Kansas practice, is the equivalent of a demurrer (*State ex rel. Ayers v. Stockwell*, 7 Kas., 98), and the motion was so treated by the Supreme Court in this proceeding. After argument by counsel, the Court took the motion under advisement and in ruling thereon, sustained the same, and rendered general judgment for costs against all defendants and awarded execution against them generally. The Supreme Court of Kansas is the court of last resort in that State.

SPECIFICATION OF ERRORS.

Plaintiffs in error respectfully submit and rely upon the following errors in the proceedings in the cause:

FIRST: The Supreme Court of Kansas erred in ruling and adjudging that the Common law of England governing the title to the beds of non-tidal streams, as such law existed prior to the fourth year of James the First, was not the law of the organized Territory of Kansas in the years 1859-1860.

SECOND: The Supreme Court of Kansas erred in ruling and deciding, upon the pleadings and without evidence, that the Kansas River was a navigable stream in and prior to the years A. D., 1859-1860.

THIRD: The Supreme Court of Kansas erred in ruling and deciding that the United States did not have authority to vest in patentees of the lands of the National domain bounded by the Kansas River, the title to the bed of that stream, opposite to the banks thereof included within the grant.

FOURTH: The Supreme Court of Kansas erred in ruling and deciding that patents from the United States granting lands bounded by the Kansas River, when such patents issued prior to January 29th, 1861, did not vest in the patentee of the adjoining upland title to the bed of the stream, to the centre of the main channel thereof.

FIFTH: The Supreme Court of Kansas erred in rul-

ing and deciding that under the Common Law as adopted by statute as the law of the State of Kansas, a prescriptive right could not arise against the State.

SIXTH: The Supreme Court of Kansas erred in ruling and deciding that under the treaty of 1854 between the United States and the Shawnee Indians, and the treaty of January, 1855, between the United States and the Wyandotte Indians, the individual members of said tribes to whom were allotted lands bounded by the Kansas River, did not take title to the centre of the channel.

SEVENTH: The Supreme Court of Kansas erred in ruling and adjudging that defendant was not deprived of the equal protection of the laws and of the protection of equal laws, by the manner in which Chapter 259 of the laws of Kansas, 1913, was adopted by the Kansas Legislature.

EIGHTH: The Supreme Court of Kansas erred in ruling and adjudging that sands having no fixed situs and which are in constant motion, mixed with the waters of the streams of Kansas, and which sands were not the product of erosion or attrition of its bed or banks, are property of the State of Kansas in a proprietary sense, and in such sense as to be salable by it in their natural condition and unreduced to possession, for the benefit of its general treasury.

NINTH: The Supreme Court of Kansas erred in ruling and adjudging that the State of Kansas has such a proprietary right in the bed of the Kasas River, and in the beds of all streams within the State, that said State may sell the subaqueous portion of the bed for its own profit.

TENTH: The Supreme Court of Kansas erred in ruling and adjudging that the provisions of Chapter 259 of the Session Laws of Kansas, 1913, are applicable to plaintiffs in error and to others similarly situated, under the pleadings in this cause.

ELEVENTH: The Supreme Court of Kansas erred in sustaining the motion of the State to quash the return of the plaintiffs in error to the alternative writ in this cause issued.

TWELFTH: The Supreme Court of Kansas erred in rendering general judgment upon the pleadings in this cause against the plaintiffs in error.

THIRTEENTH: The Supreme Court of Kansas erred in overruling the motion of plaintiffs in error for a rehearing of this cause.

THE PLEADINGS.

The petition or application for the writ.

Commencing with the allegation that the plaintiff is one of the Sovereign States of the American Union, the petition, or application for the writ, alleges that as a sovereign commonwealth the State has sovereignty, ownership, dominion and control of the rivers, streams and waters within said State and of the lands underlying and beneath such rivers, streams and waters except such as have been patented, granted, or otherwise conveyed by the United States of America, or by this plaintiff.

Plaintiff further avers that the defendants Akers and Davis are, respectively, Treasurer and Auditor of the State of Kansas, the petition alleging that the other defendants are engaged in taking sand from the rivers, streams and waters of the State of Kansas and the lands, channels and beds underlying the same, "which rivers, streams and waters and the lands, beds and channels underlying the same and the sands, oil, gas, gravel, coal and other natural products within such beds, are under the sovereignty, ownership, dominion and control of the plaintiff." (Of the nature of the State's interest in the streams of the State of Kansas, in general, and their beds, here intended to be advanced, we are not left in doubt, as the action is based upon Chapter 259 of the Session Laws of Kansas, 1913, Section 6 of which provides:

"For the purposes of this act, the bed and channel of any river in this State or bordering on this State, to the middle of the main channel thereof, and all islands and sand bars lying therein, shall be con-

sidered to be the property of the State of Kansas, unless this State or the United States has granted or conveyed an adverse legal or equitable interest therein, since January 29th, 1861, A. D., or unless there still exists a legal adverse interest therein, founded upon a valid grant prior thereto," etc.,

And Section 5 provides that

"The net proceeds derived from the *sale* of any *State property* under this act shall be paid to the State Treasurer," etc.

The State here, most clearly claims absolute ownership of the streams within the State and the beds of the streams within the State, except instances where the State has or the United State have made a valid grant thereof). The petition further, in substance avers that under the provisions of Chapter 259, the Executive Council of the State of Kansas fixed a price upon the right to take sand from the beds of such streams and defendants paid the same under protest to the State Treasurer; that it was the duty of the State Treasurer to cover the moneys so received into the general revenue fund of the State; that the State Auditor allowed the Treasurer to withhold said moneys from the payment into the general fund, because of an order of the Executive Council directing such moneys to be kept in a special fund to be known as the "River Fund;" that said Auditor and Treasurer had no lawful excuse for withholding said moneys from the general revenue fund and were guilty of a breach of their plain duty in not making payment of said moneys into the said fund; and that the protests and claims of the other defendants were not sufficient, in law, to withhold the relief claimed by plaintiff, to-wit: the right to a mandatory order to the Auditor and Treasurer

to have such moneys paid forthwith into the general revenue fund of the State. The relief sought, in addition to the prayer for a writ of mandamus against the Auditor and Treasurer requiring them to perform their alleged duty, asks for judgment against the other defendants "barring them and each of them, from any and all claim, right or interest whatsoever in the moneys aforesaid, heretofore paid in by them," and for general relief.

The petition considered, it becomes at once apparent that the basis of the State's claim to the funds paid in by the protesting defendants, is the alleged ownership of the streams and of the beds of the streams from which the sands were taken, and in connection with the taking of which such protested payments were made. Before the court could award the writ in this case it must determine that the State was the owner of the river beds and waters from which the sand, payment for which is claimed, is taken. The petition implies possession of the stream beds by the defendants as it alleges dredging of sand therefrom for many years by such defendants under some alleged claim or right.

Under the Kansas practice, as hereinafter outlined, the granting of the permanent writ would be the same in effect as a judgment in ejectment as it would determine adversely to the answering defendants both the title and possession of the real estate in controversy. It is evident that the possession by the answering defendants, of the stream beds, was adverse to the claim of ownership by the State. The payment under protest settles that question. The State is now, for the first time, asserting right to possession as against the answering defendants. It may be conceded that, ordinarily, mandamus is a proper and ordinary remedy to secure the performance of official duties of the character

specified in the petition, but it is very apparent that the remedy is here invoked for a very different purpose; its real object is not to obtain the performance of an official duty by the Auditor and Treasurer, but its purpose is to obtain, through the judgment of the Court, a title to real estate from others who are already in possession of and claim an interest therein.

If counsel are right in this view of the purpose of the proceeding, then arises the question whether an answer tendering *issuable facts has been filed in the cause.*

The answer of each defendant, having admitted the sovereignty of the State and the official character of the defendants Akers and Davis (who, by the way, do not answer), that they dredged sand from the Kansas River, and that they paid the moneys referred to in the petition to the State Treasurer under protest and claim ownership of said funds, and are entitled to the possession thereof, then tender the general issue; thus putting in issue every traversable fact stated in the petition. They then plead specially:

(A) The adoption, in 1855, by the Territorial Legislature of Kansas, of the Common Law of England and all statutes and acts of Parliament in aid thereof made prior to the fourth year of James the First, and which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States and the act entitled, "An Act to Organize the Territory of Nebraska and Kansas;" and, while such was the law of the Territory, and before the admission of Kansas into the Union, the United States issued its patent, conveying certain described lands bounded on the north by the Kansas River to one Gardner, through whom each defendant claims title, and that the lands

so patented were the lands upon which, and upon the river bounding the same on the north, the defendants (now plaintiffs in error), carried on their sand dredging operations, the defendants claiming the ownership of the bed of the stream adjoining and bounding their respective holdings to the centre line of the main current, and that they and their predecessors in title openly held and had possession of and dominion over said river bed.

(B) That in 1864 the State of Kansas, by statute, recognized the Kansas as a non-navigable stream. That the sands therein were no part of the fixed bed or banks of the stream but were unfixed, moving constantly, and uncertain in location; fugitive in their nature, and of such character that whosoever first reduced them to possession was entitled to ownership thereof.

(C) That a suit then was pending and undetermined in the District Court of Wyandotte County, Kansas, a Court of general jurisdiction, against one of the defendants, instituted by the State, for the purpose of determining the ownership of the bed of said stream as between it and said defendant, the decision of the matters in controversy in which suit would determine every issue raised in the present proceeding; that the Supreme Court of Kansas is without jurisdiction to entertain and determine, in the first instance, proceedings to try and determine controversies involving the right to property.

Defendants also claimed the protection of the "deprivation" and "equal protection" clauses of Section 1 of the Fourteenth Amendment to the Constitution of the *United States*.

Consideration of the pleadings makes it at once ap-

parent that the State, for all purposes of the controversy, admitted as true, the claim of the defendant Wear that

(1) "The said described tract of land adjoins the Kansas River and has said river for its northern boundary, and defendant is the owner of that portion of the bed of said river adjoining his said described real property in the same title in which the same was held and owned by the said George Gardner, without any diminution of right or exception whatsoever, and has been such owner and has held possession of said river bed and of said real estate undisturbed, openly and notoriously and without question of its right so to do for many years prior to the publication of said Chapter No. 259 of the Session Laws of Kansas, 1913, and that the several successors in title of and intermediate said Geo. Gardner and this defendant, in like manner held title to and possession of said Lot 5 and the bed of the Kansas River adjoining said Lot 5, throughout the years from said October, 1860, to the entry of this defendant into possession, openly, notoriously, exclusively and under claim of ownership through and under title deduced from said patent" (Trans., pp. 9 and 10),

and further

(2) "That on the first day of October, A. D. 1860, and while said statute was still in force in and the law of said Kansas Territory, (referring to the statute adopting the common law of England as the law of Kansas Territory) the United States of America, by its certain patent in writing, of that date, gave and granted unto George Gardner all of Lot No. Five (5) in Section Thirty (30), Township Eleven (11) Range Sixteen (16), in the District of Lands subject to sale at Leecompton, Kansas Territory, containing 12.20 acres, which said Lot No. 5 in Section 30 adjoined and was bounded by the Kansas River and is located in what is now the County of Shawnee in the State of Kansas (Trans., p. 8). * * * That the Kansas River is and at all times has been a non-tidal stream, in which the tide does not ebb and flow, and that by reason of the

premises, and under the provisions of said law (referring to the Common Law as adopted by the statutes of the Territory) the said George Gardner became the owner of and was vested with the absolute title to all that part of the bed of the Kansas River adjoining said Lot 5, in Section 30, to the centre of said stream, and between the end lines of said Lot No. 5 in Section 30 extended to the centre of the stream, together with all rights, interests and privileges thereunto appertaining.

(3) That the title of said Gardner descended through various mesne conveyances to this defendant and defendant become the owner and is now the owner and in possession of all of that part of said Lot No. 5, Section 30 aforesaid, described as follows, to-wit:" etc. (Trans., p. 9.)

(4) A like claim of the defendant Fowler (plaintiff in error herein) that he held in the right of absolute ownership, under his lessor (Trans., pp. 20-21) also stands admitted.

All other material allegations of the answers stand admitted as true by the demurrer, so that all issues of fact tendered by the pleadings stand adjudicated against the State.

It must also be taken as admitted that the claims of the State, insofar as the same come within the effect of the general denial contained in each answer, were untrue in fact, (being within the effect of the general denial) for otherwise the court, under the prevailing practice, as hereinafter outlined, would have sent the facts placed at issue by the denial, to a jury for trial and determination, a right constitutionally vested in the defendants, as the title to real estate was at issue.

All facts well pleaded by defendants having been ad-

mitted in their favor, and all facts affected by defendants' plea of the general issue having been allowed against the State for the purposes of the decision of the controversy, the entire case of the State is narrowed down to the effect of Chapter 259 of the Session Laws of Kansas, 1913, upon the rights of riparian owners on Kansas waters, and the nature of the title conferred by the Patent from the United States to Lot 12 in Section 30, in favor of George Gardner.

MATTERS OF KANSAS PRACTICE.

In passing, we desire to direct the attention of the Court to the matters of Kansas practice referred to in these pages. The proceeding in *Mandamus*, under the Kansas practice is not the Common Law remedy. It is a special proceeding governed entirely by statute. Art. 32, Gen. Stat., Kans., 1915 (McIntosh), p. 1525 *et seq.* Though the purpose of the issue of the writ, as defined by the statute, is very limited, the Supreme Court of the State has so construed the provisions of the Chapter as to permit of the use of the writ under certain circumstances for the purpose of trying the right of title to property.

Under the rules of practice governing this proceeding in the state courts, defendants in the action, of whom the performance of no official duty is sought, are brought in that they may have opportunity to show that the performance of the act demanded would be prejudicial to their personal or property rights and ought not, for that reason, to be performed.

State v. Dolly, 82 Kansas, 1. c., 538;

Ousley v. Osage City, 95 Kans., 1. c. 260.

The issues joined must be tried and all further proceed-

ings thereon had in the same manner as in a civil action.
Gen. Stat. Kans., 1915 (McIntosh) Sec. 7654.

The pleadings must be construed as in an ordinary civil action.

Crans v. Francis, Treas., 24 Kans., 750.

If judgment shall be given for the plaintiff he shall recover the damages which he shall have sustained, to be ascertained by the Court, or jury, or by a referee, as in a civil action.

Gen. Stat. Kans., 1915, Sec. 7655.

By Sec. 5 of the Bill of Rights in the Constitution of Kansas "the right of trial by jury shall be inviolate," and it is held that:

"In an action commenced for the purpose of settling disputed questions of title to real estate, and to recover the possession thereof, either party is entitled to a jury as a matter of constitutional and statutory right, regardless of the form in which the action may be brought."

Atkinson et al. v. Crowe Coal & Mining Co., 80 Ks., 161:

In which case it was further held that where the granting of an injunction would be determinative of the rights of the parties to the land, the fact that the action was equitable in form would not be permitted to deprive parties of their constitutional right to a trial by jury.

In mandamus proceedings the return (or answer) must contain all defenses which defendant desires to urge.

Stevens v. Miller, 3 Kans. App., 192.

A motion to quash the return of the writ is equivalent to a demurrer thereto, and can only be sustained when in fact the answer contains no defense to plaintiff's cause of action.

Crans v. Francis, Treas., 24 Kans., 750;
State ex rel. Ayers v. Stockwell, 7 Ks., 98.

BRIEF OF ARGUMENT.

The answers of Wear and Fowler, pleading the patent to George Gardner for Lot 5 of Section 30; that the English Common Law and statutes in support thereof enacted prior to the fourth year of James the First was the law of Kansas Territory at the date of the issue of the Patent, and that defendants hold in Gardner's right and title, the only possible theory upon which the decision in this case could have been reached is the theory: (a) that the Common Law was *not*, in fact, so in force; or (b) if in force, did not govern in the matter of titles to lands bordering on fresh water rivers in the Territory; or (c) that the United States did not have power to grant its lands bordering on fresh water streams, so that the title to the bed of the stream, to the center of the main current, passed to its grantee. The view last stated is, apparently, rebutted by the exceedingly broad claim of the State's rights as set out in the petition for the writ, and as determined by the provisions of Chapter 259 of the Session Laws of 1913, upon which the petition is based. The allegation in the petition is that the State "*has sovereignty, ownership, dominion and control of the rivers, streams and waters within said State and of the lands underlying such rivers, streams and waters except such rivers, streams and waters and the lands underlying and beneath the same as have been patented, granted or otherwise conveyed by the United States of America, or by this plaintiff.*" (Trans., p. 2.)

The exception contained in the quotation seems to imply the right of the United States to grant "lands underlying such rivers, streams and waters," and could be, ordi-

narily, treated as a clear recognition of such right, were it not for the opinion of the court in this case which seems to question such right, in the matter of streams navigable in fact but not technically so.

Section 6 of said Chapter 259 provides "for the purposes of this act" (sic.) the bed and channel of any river in this State or bordering on this State to the middle channel thereof * * * shall be considered to be the property of the State of Kansas, unless this State, or the United States (sic.) has granted or conveyed an adverse interest therein founded upon a valid grant prior thereto," etc.

Broad as are the provisions of this Section, they are widely exceeded by the allegations quoted from the petition. Even the claims founded on the act itself, however, greatly exceed the claims of any country under any known system of law, present or past, and certainly do not conform to the well settled rights on this subject of any other State in the Union where the soil did not originally belong to the State.

If it was the intention of the Supreme Court of Kansas, by its opinion rendered in this case, to hold that the United States did not have authority to grant the land underlying any of the waters of the State, which waters, though fresh, were navigable in fact, such holding appears to be directly opposed to the legislative will as evidenced by the above quotation from Section 6 of the Act under consideration, which in clear and precise terms, recognizes as valid, for all purposes of the act, grants made by the United States, either before or subsequently to the admission of the State into the Union, and the statutes of Kansas Territory, adopted in 1855 and 1859, adopting the Common Law. As it is hardly to be conceived that it was the intention of the Court to deny the existence of a power which

the legislative act emphatically and most clearly recognizes, we must conclude that anything apparently to the contrary contained in the opinion of the Court is not intended to be so construed and so we may dismiss from further consideration the question of power in the United States to validly grant the subjacent soil in streams navigable in fact, unless we assume that it was the intention of the Court to construe the statutory recognition of the power as not applying to non-tidal waters navigable in fact.

What was the law of Kansas Territory at the date of the issue of the patent to George Gardner insofar as grants bounded by fresh waters were concerned?

By the terms of the Act of May 30th, 1854, commonly known as the Kansas-Nebraska Act, certain of the landed possessions of the United States were erected and organized into territories and a complete scheme of government was provided for such new territories: By Section 24 of the Act, it was provided: "That the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this Act, *but no law shall be passed interfering with the primary disposal of the soil.*" By Section 20, it is provided, among other things, that the territorial secretary "shall transmit one copy of the laws and journals of the Legislative Assembly, within thirty days after the end of each session and one copy of the executive proceedings and official correspondence semi-annually, on the first days of January and July in each year, to the President of the United States and two copies of the laws to the President of the Senate and to the Speaker of the House of

Representatives, to be deposited in the libraries of Congress."

Section 32 of said Act provides in part * * *

"That the Constitution, and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory of Kansas as elsewhere within the United States, except (slavery compromise measures) * * *

At the first session of the territorial Legislature in 1855, it was enacted:

"The Common Law of England and all statutes and acts of Parliament made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom, and not repugnant to or inconsistent with the Constitution of the United States, and the act entitled 'An Act to Organize the Territory of Nebraska and Kansas,' or any statute law which may from time to time be made or passed by this or any subsequent Legislative Assembly of the Territory of Kansas, shall be the rule of action and decision in this Territory, any law, custom or usage to the contrary notwithstanding."

Statutes of Kansas Territory, Ch. 96, Sec. 1, p. 469.

This statute was re-enacted as here set out, by the territorial Legislature in the month of February, 1859.

Kansas Statutes 1859, Ch. 121, p. 615, Sec. 1.

The necessary result of this Act was to abrogate every law, custom or usage at that time existing in the territory, including the Customs of Paris, Code Napoleon, the Spanish law and all customs of locality. In grant-

ing to the people of the territory the right to legislate upon all rightful subjects of legislation, the Congress constituted the people of the territory the *sole judges* within the prescribed limits, *of what were their wants and conditions and what was suitable to those wants*. In adopting the common law the people exercised this judgment, and the supervising authority, the Congress, never said them nay. In the selfsame section of the Statute whereby the common law was adopted, the people, out of superabundance of caution, provided for successive exercises of that judgment, by excepting also from the rules of the common law all subjects of legislation which might be covered by any *subsequently enacted* statute. *Nothing was excepted which then existed*, only the constitutional provisions and the provision of the Organic Act.

In adopting the common law, therefore, the usages, customs and laws prior prevailing were absolutely abrogated, and thenceforward (except insofar as it might become necessary to determine vested rights under them), were as though they had never existed.

Pollard v. Hagen, 3 How. (U. S.) 1. c. 227.

Section 4 of the Schedule to the Constitution of Kansas, adopted July 29, 1859, five months after the re-enactment of said Statute, provides:

"All laws and parts of laws in force in the Territory at the acceptance of this Constitution by Congress, not inconsistent with this Constitution, shall continue and remain in full force until they expire or shall be repealed."

It thus appears that up to the date of the adoption of the Constitution, the statute referred to continued in

force, was further continued by the general provision in the Schedule to the Constitution as representing the policy under which the new State proposed to enter the Union.

That this Statute and the policy embodied therein were not deemed inconsistent with the Constitution, had not been repealed prior to the acceptance of the Constitution and were not excluded, by the exception in Section 4 of said Schedule, from being continued in force as laws of the new State, is conclusively evidenced by the action of the first State Legislature which, by Section 1, Chapter IV, compiled laws of Kansas, 1862, pp. 81-82 (approved March 6th, 1862), continued Sections 1 (and 2) of Chapter 121 (being the Section above quoted), of the Acts of the Territorial Legislature, 1859, in force, while expressly repealing all other provisions of the same Chapter.

Under the general rule that officers charged with the performance of an act are presumed to have complied with their duty in that regard, we may assume that upon the enactment in 1855 of the Statute above quoted, and upon its re-enactment in 1859, the Territorial Secretary, in compliance with the requirements of the Act of Territorial Organization, forwarded to the President and to the Houses of Congress, copies of these Acts, whereby the United States were advised of these enactments of the Territorial Legislature. History nowhere discloses any objection thereto on the part of the United States. On the contrary, the Constitution adopted by the residents of Kansas Territory as the fundamental law of the new State of Kansas, continuing such acts in force, as we have seen, was expressly approved by the Act of Congress, admitting the State into the Union. From these facts we are authorized to conclude, conclusively, that the Acts themselves and the policy evidenced thereby, were not con-

sidered as in conflict either with the Constitution or laws of the United States or with a republican form of government.

In 1868, and by Chapter 119 of the General Statutes of Kansas of that year, the Statute in question was somewhat modified, but as all rights which the defendants now claim had vested years before that date, we are not concerned with the effect of such modification.

What, then, was the Common Law of England, insofar as it affected titles to real estate bounded by a fresh-water stream, navigable in fact or otherwise, as such law existed at and prior to the fourth year of James the First of England. It seems almost impertinent to impose upon the time of this Court by entering upon a discussion of principles of law so well settled as those now under consideration, but the Supreme Court of Kansas, in its decision in this case, seems to have lost sight of the wording of the governing Statute. The Court discusses at much length what it conceives to have been the Common Law *in this country*, at the date of the issue of the patent under which plaintiffs in error claim, and point to the decision of this Court in the case of the *Genesee Chief*, 12 Howard (53 U. S.) 443 as relegating to the waste basket the English Common Law rule of private ownership of the beds of rivers and waters navigable in fact, though above the ebb and flow of the tide (Trans., p. 79). We will see hereafter whether the question actually before this Court in that case could, in any view of the matter, be held to apply or have reference to the Common Law rule governing the vesting of titles to the beds of such waters. We will content ourselves at this time by simply stating in this connection that the sole question there presented and considered by this Court was whether certain rules of Eng-

lish Admiralty law were in force in this country, when considered in connection with conditions which did not and could not by any physical possibility exist in England; conditions which, therefore, the Courts of that Country never were and never could be called upon to consider and determine judicially.

Had the Territory of Kansas the power to enact a law which provided for the vesting of title in the subjacent lands of the navigable (in fact) waters of the territory? We think there is no question about it. The Court, in *Clinton v. Englebrecht*, 80 U. S., l. c. 441, says:

“The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants *all the power of self government* consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress. As early as 1784 an ordinance was adopted by the Congress of the Confederation providing for the division of all the territory ceded, or to be ceded, into states, with boundaries ascertained by the ordinance. These states were severally authorized to adopt for their temporary government, *the constitution and laws of one of the states*, and provision was made for their ultimate *admission by delegates* into the Congress of the United States. We thus find the first plan provided for the adoption of State Governments from the start and committed all matters of internal legislation to the discretion of the inhabitants, unrestricted otherwise than by the state constitution originally adopted by them.”

And again (l. c. 443-44):

“In all the territories full power was given to the legislature over all ordinary subjects of legislation.

The terms in which it was granted were various, but the import was the same in all."

This case will well repay examination upon this subject of territorial power.

This general grant of power to the territories has been held to include the right to grant acts of incorporation, though no specific mention of this power is made in the Organic Act.

Trustees for Vincennes University v. Indiana, 14 How. (U. S.), 268.

The Court say (l. c. 273):

"Provision is made in the ordinance for the appointment of a legislative council, and it is then provided that 'the governor, legislative council, and House of Representatives, shall have authority to make laws, in all cases for the good government of the district, not repugnant to the principles and articles of this ordinance.'

Under the ordinance, the legislature of the territory was vested with general legislative powers restricted only by the articles contained in that instrument. It has power to grant an act of incorporation with all the functions necessary to effectuate its objects. There can be no question, therefore, that the corporate powers vested in the plaintiffs, by the legislature of the territory, were legitimately conferred. And these powers were not affected and could not be affected by the Constitution of the State. It provided that 'all rights, contracts and claims, both as respects individuals and bodies corporate, shall continue as if no change had taken place in this government.'"

A well considered case upon the subject of the power of territories to legislate, is that of the *Territory of Dakota*

ex rel. McMahon v. O'Connor, 3 L. R. A., 355, to which the attention of the Court is respectfully referred. Upon page, 359, the Court say:

"It is too late now for the Courts to hold that the territory is other than a temporary sovereign government—temporary in that its organic laws and its very existence are subject to the paramount will of Congress, its creator; sovereign, in that its executive, legislative and judicial powers are unlimited, except by the terms of the Constitution or its organic law. When Congress created the temporary sovereign government of the territory, it intended to confer upon it such legislative powers as are usually exercised by sovereign states."

And again, upon page 358, the Court says:

"The term 'rightful' has more the significance of 'lawful' and the clause must be interpreted to mean that Congress grants to the territorial legislative assembly all the powers necessary to be exercised by it in the establishment of a temporary sovereign government. * * *

It has sometimes been said that the territory is an 'embryo state'; and while the Congress has never surrendered its right of supervision over the legislation of the territory, yet such power of Congress has been very rarely exercised in most of the territories * * * so that in organizing the temporary government, Congress intended such government to have and exercise all the attributes of sovereignty temporarily, subject only to such supervision as the Congress shall choose from time to time to exercise over it.

With this residuum of power, remaining in Congress, dormant except when expressly exercised, the government of the territory is sovereign in each department, and its organic law is to be construed as its constitution, either in the light of a grant or a limitation of power. Perhaps as to some portions, it

is to have the former, and as to others, it is to have the latter construction."

Hornbuckle v. Toombs, 85 U. S., 655, l. c. 655-56;
Cooley's Principles of Constitutional law, students' series, pp. 182-3-4-5.

As to titles emanating from the United States.

Whenever the question in any Court, State or Federal, is whether the title to property which has belonged to the United States has passed, that question must be resolved by the laws of the United States, but whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

Wilcox v. Jackson, 13 Peters, 498.

By Section 9, Chapter 29, 4th Congress, 1st Session, 1796, First Statutes at Large, "An Act providing for the sale of lands by the United States in the territory northwest of the River Ohio and above the mouth of the Kentucky River", it is provided

"That all navigable rivers within the Territory to be disposed of by this Act, shall be deemed to be and remain public highways and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become common to both."

By Section 5, Chapter 35, Sess. 1, 8th Congress, 184 (2 Stat. at Large 279), it is provided:

“All lands other than the reserved sections and those excepted as above mentioned, remaining unsold at the closing of the public sales, may be disposed of at public sale by the Registers of the respective Land Offices, in the same manner, under the same regulations, for the same price and under the same terms and conditions as are or may be provided by law for the sale of lands of the United States north of the Ohio River and above the mouth of the Kentucky River.”

The specific provisions of the Act of the first session of the 4th Congress above quoted, are, by the provisions of said Sec. 5, made applicable to the disposition of the public estate in general and by such provisions, in determining the location of the title to lands which form the beds of streams, where the land on opposite banks has been disposed of by the United States and belonging to different persons (or to the same person, for that matter), whether the stream is in fact navigable or non-navigable becomes a fact to be proven. If the stream is, in fact, non-navigable, the title passes to the patentee of the banks by virtue of the legislative act. If the stream is, in fact, navigable, the location of the title to the bed is left to be determined by the local law, as we shall hereafter see. In every case for the judicial determination of the title to the beds of streams, the title to the lands on the banks having passed from the United States, it becomes therefore, an essential fact to be established, whether the stream was in fact navigable at the date of the issue of the patent for the land on the banks. On the determination of this fact hangs the question of title to the stream beds under the public land laws.

It is conclusively apparent from these considerations that the United States have, from the very beginning,

claimed and expressed the right to dispose of the beds of water courses throughout their public domain. As to non-navigable streams, the title to such beds has been disposed of under provisions of the general land laws. While the beds of streams and waters navigable in fact have never been disposed of by general laws, such fact does not by any means infer lack of power in the United States to dispose of the title to the beds of streams in the public domain, when such streams are navigable in fact. That such power has at all times been vested in the United States is now too well settled to be open to question. Whether they have so disposed of the beds and the extent of the title conferred in case of such disposition, again are questions of fact to be determined, in case of dispute, by the proper judicial tribunal and in accordance with the due and orderly course of procedure for the determination of questions of disputed title.

Whether a stream is navigable is a question of fact, the burden of proving which rests on the party asserting it.

Ligare v. Chicago, Madison & N. W. R. R. Co.,
166 Ill., 249;

People v. Economy Power Co., 241 Ill., l. c. 333.

The manner in which the right and power of disposition have been exercised, is of little consequence. The question is, has the right been exercised? Since the power of disposition is vested, and has actually been exercised by statutory enactment, as far as the beds of non-navigable waters are concerned, the exercise of the power by the Territory, under lawful authority of the United States, cannot be contrary to the laws of the United States. The

General Government has permitted the states admitted subsequently to the Union of the original thirteen, and formed from the public domain, to exercise this right as each State saw fit, as we shall hereafter see, and each such State has in fact, exercised the right. If any State should deny the right in the United States, then the State so denying must show its own sovereign power derived otherwise than through the laws and Constitution of the United States, a showing which the State of Kansas certainly cannot make, and to admit the right of delegation of the exercise of this power to a State and deny the power of delegation to any other lawful governmental body under authority of the United States, is to invoke a doctrine which can only exist and have its inception in a constitutional inhibition. Needless to suggest that no such inhibition exists. That the exercise of the power of disposition by a State is but a delegation of such power, logically follows from the recognition of the power to forbid interference with the primary disposal of the soil by the United States.

Act of May 30, 1854 (Kansas, Nebraska, Act.),
Sec. 24.

It cannot successfully be claimed that the Common Law of England concerning such titles is in conflict with the laws or Constitution of the United States for such common law is identical with the laws of the United States in that regard. It is of no consequence in what manner the United States have exercised the right of disposition or whether they have exercised the right at all, or have delegated the right of its exercise to the States severally or to territories formed out of the public domain.

Whether it has been exercised is, again, a question of fact and if so, the result of such exercise, so far as the vesting of title is concerned, is a question of fact. In case of dispute as to whether the right of disposition has been exercised and if exercised, the location of the title to the subaqueous lands, are questions to be decided by a lawfully constituted tribunal in due course of orderly procedure in such cases applicable. To deny a claimant of the title a lawful hearing on the question of fact as to whether his claim of title is good, is to deprive him of the equal protection of the laws and of the protection of equal laws.

We have heretofore seen that the Territory of Kansas was duly and regularly organized and that by the organic act the legislative power extended to all rightful subjects of legislation. That the recognition of titles to real estate and the devolution, preservation and transfer of such titles are rightful subjects of legislation is so patent as to need no more than mere mention.

As provision was made for subjecting the Acts of the Territorial Legislative body to the Executive and Legislative authorities of the United States, we are justified in assuming knowledge by such authorities of the acts of such Territorial Legislature and since there exists no record of any disavowal of such Acts by the United States, we are authorized also to assume approval by the general government of such enactment.

In *Clinton v. Englebrecht*, 13 Wall., 434, 446, the Court say (l. c. 446):

“In the first place we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the Statute book

for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the Territory to transmit to that body copies of all laws on or before the first of the next December in each year. The simple disapproval by Congress would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

And see

Williams v. The Bank of Michigan, 7 Wend., 539;

Swan v. Williams, 2 Mich., 427;

Stout v. Hyatt, 13 Kans., 232;

Himman v. Warren, 6 Ore., 408.

Nor can we discover any provisions of the Organic Act which said Statutes of 1855 and 1859 can be held to contravene. If such statutes are legislative acts of a territorial government authorized by the United States to so legislate and the Common Law as it existed in and prior to the fourth year of James the First, recognized the title to the beds of fresh water streams as vested in the owner of the adjoining banks and lands, even though the stream was, in fact, non-tidal but navigable then by valid legislative enactment subsequent to the decision in that case, the contention of the State in this cause that the decision of the Genesee Chief held the rule of the Common Law inapplicable in the determination of titles to the beds of streams navigable in fact, meets complete refutation, the rule of such decision having been changed by legislative act.

The extent of the power vested in and which may be exercised by territorial legislatures is well exhibited in the opinion of the Court in *The State of Kansas v. String-*

fellow, 2 Kans., l. c. 312. In the course of that opinion the Court say:

"The object of the Act of May 30th, 1854, was to define the boundaries of, and establish municipal governments within the Territories of Nebraska and Kansas. All the necessary machinery for such a government was provided—a legislature to enact laws, Courts to administer them and an executive to execute them.

In inaugurating, managing and directing their domestic policy *the people were omnipotent*, except insofar as they were restrained by the Constitution and laws of the United States. They might lawfully provide for the protection of themselves and their property. They could establish County, Township and City governments. *They could regulate the alienation and acquisition of property.* In short, the power of the legislature extended to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of the Act organizing the Territory. This grant certainly included the power to establish schools. They were rightful subjects of legislation."

The history of the Common Law in Kansas is gone into in great detail in the case of *Clark v. Allaman*, 71 Kansas, 206, to which case the attention of the Court is most respectfully directed. Having traced the adoption of Common Law rules from their inception in the Territory from which the State of Kansas was finally formed, to the year 1868, the learned writer of the opinion in that case observes (l. c. 222).

"From this sketch it will be observed that the authority of the Common Law was prevalent throughout the confines of the State under every civilized form of governmental organization from the earliest times until the autumn of 1868, and all other systems were finally supplanted and obliterated and could not be appealed to as a measure of right. Such constant

adherence to its principles could not have been occasioned by accident or by indifference, but must have been the natural result of a deep seated conviction of its complete efficiency as a means of justice."

And again, on page 224, 225:

"The tide of immigration followed the lines of the water courses. Along their banks the first land titles were acquired, the first homes founded, the first cities built, the first industries established. Therefore, the Common Law relating to riparian rights was not a mere matter of academic interest or learned study, as a survival from mediaeval times, to those who established the foundations of the State's greatness, *but it was the law of reason and of justice, responding to the actual demands of the times and the circumstances and needs of the people.*"

And on page 226:

"Under these circumstances there is no room for debating either the existence or the justice of the common law rules relating to the rights of riparian land-owners of this State."

"What is true of the system must be true of each rule which it embraces, and the common law rules relating to riparian rights became the law of Kansas for every stream within its borders." Id., 229.

In 1868, effective October 31st, 1868, the Statute of Kansas was amended to read as follows:

"The Common Law, as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people shall remain in force in aid of the general statutes of this State; but the rule of the Common Law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this State, but all such statutes shall be liberally construed to promote their object."

Gen. Stat. Kans., 1868, Ch. 119, Sec. 3.

Speaking of this modification of the statutes of 1855, 1859 and 1862 (all of which as we have seen, were identical in terms), the Court in the case under discussion (*Clarke v. Allaman*), uses this language (l. c. 230):

“But this statute was not designed to disturb any part of the common law which, because of its adaptability to the genius and needs of the people, and become the established law of Kansas. It gave authority for the neglect of all rules of the ancient common law that were inapplicable to the exigencies of an independent, self-directing people striving with their own peculiar conditions and circumstances, *but none of those doctrines that already had been absorbed and incorporated in the legal system of Kansas was affected*; and no part of the settled law of the State having the common law for its source became exposed to repeal, either by the repetition of infractions by individuals in particular localities or *by judicial legislation based upon such infractions.*”

Common law titles to lands forming the beds of fresh water streams.

The nature of the system adopted by the Statutes of 1855, 1859 and 1862 being thus been so ably, authoritatively and exhaustively stated and adjudicated, the provisions of the system as to titles to lands forming the beds of bodies of water, must be the next subject of inquiry.

“Under the common law of this State, the title of a riparian owner upon unnavigable waters extends to the thread of the stream.”

Kregar v. Fogarty, 78 Kas., l. c. 549.

No case in the State of Kansas has ever been decided

contrary to this holding. As it undoubtedly states the law on the subject, we shall not, unnecessarily weary the Court by useless iteration or by reference to other decisions. However, as the Kansas Statute of 1868, modifying the law as established by the prior statutes of 1855, 1859, 1862, was adopted by Oklahoma and came under consideration in the case of *U. S. v. Mackey*, 214 Fed., 137, it may not be out of place to give the opinion of Judge Campbell on the question generally, whether the water is technically navigable or not:

“The Arkansas River, at the point in controversy is not affected by the ebb and flow of the tide. If, therefore, we are to apply the strict rule of the common law *as it existed in England at the time this country was colonized*, the rights of the owners of the uplands bordering upon this stream must be considered as extending to the middle thread of the stream *to the exclusion of the State*, subject only to the public right of navigation. (*Shively v. Bowlby*, 152 U. S., 1). There being no constitutional or statutory law or judicial decisions of Oklahoma modifying this feature of the common law, it only remains whether in view of the condition and wants of the people of the State, this original doctrine of the common law, as it prevailed in England, must be considered as modified by such conditions and wants, and if so, to what extent.” (The italics are not in the original).

The last paragraph bears reference to the modification of the original Kansas Statute, by the law of 1868, and is inapplicable to such original statute. The case finally turns upon the question of navigability of which the court took judicial notice and on such notice, decides in favor of the State. The decision, however, has been reversed by the United States Circuit Court of Appeals, *U. S. v. Mackey*, 132 C. C. A., (216 Fed., 126), 370, *et seq.*, the court holding

that to authorize a Court to sustain a demurrer to a bill by reason of matters of which it takes judicial notice, requires a very clear case.

The Supreme Court of Kansas, in the decision of the case at bar holds that no title to the bed of the stream vested in Gardner by virtue of the patent to him from the United States, because the Kansas River was a navigable stream, of which fact it takes judicial notice and in support of its position, cites *Wood v. Fowler*, 26 Kansas, 682, and *Dana v. Hurst*, 86 Kansas, 947.

We respectfully urge that an examination of the State's petition in the cause nowhere discloses a claim to the stream beds in controversy upon the ground that the streams are navigable. The claim of the petition is, as we have seen, based on the broad proposition that the State is the owner of *all waters and streams, and the beds of and underlying the same*, in the State of Kansas, except where the United States have, or the State has heretofore validly granted the same. These claims are denied by the several answers and the defendants themselves claim ownership of the stream beds whereon they are operating. Whence, then, the ground for an exercise of the doctrine of judicial notice as to navigability of the stream as the basis of the decision? The land in controversy in *Wood v. Fowler* was located almost at the mouth of the Kansas River "in the neighborhood of Kansas City and Wyandotte," (26 Ks., l. c. 685), to use the words of the opinion. The Wear and Fowler lands are located in the City of Topeka, sixty miles or more upstream from the Wood-Fowler land and beyond a stretch of stream spanned by numerous fixed bridges and, across which, at least one dam (that at Lawrence), has been constructed and existed at the time the decision was rendered.

The Court takes judicial notice of the fact that the stream was meandered in the course of the making of the public surveys. Navigable streams were not the only cause for the running of meander lines however, for by the statutes governing the making of the public surveys the intervention of "Indian Reservations and tracts of land heretofore conveyed or patented" as well as navigable rivers, rendered the running of straight lines "impracticable."

U. S. Comp. Stat., 1901, Sec. 2395.

In taking judicial notice of the several matters considered material to its decision, the Court in connection with the running of meander lines should have taken into consideration that for nearly its entire meandered length the river was bordered, on both sides, by Indian Reservations, *viz.*, the Wyandottes, Shawnees, Delawares and others, and further, that the instructions issued to the surveyors in making surveys of the public lands always contained the direction:

"Navigable rivers, as well as all rivers not embraced in the class denominated 'navigable,' the right angle width of which is three chains and upwards, will be meandered on both banks at the ordinary mean high water mark," which now appears as a paragraph of the Manual. Manual of Surveying Instructions, 1890.

Such has always been the practice, even though, in the compilation of the Manual of 1855, the paragraph failed to appear.

In the case of Fuhrer (12 L. D., 556), the North Fork of the Canadian was held to have been improperly meandered in the survey of 1871, *because it was*

less than three chains in width. In that connection the Secretary of the Interior, in communicating his decision to the Commissioner of the General Land Office, May 29, 1891, reviewed the history of surveying instructions issued by the Land Office and said (p. 557):

“It appears, however, although not referred to in the manual of 1855, that it has been the practice of your office for many years to restrict the meandering of streams to those in which the right-angle width is three chains and upwards, and that *where a stream was not navigable*, and yet of a width greater than three chains, special instructions in relation thereto were issued when the contract was made * * *

In review of the facts above set forth it appears that the uniform practice of the Land Office has always been to limit the meandering of streams to those having a right-angle width of 3 chains and upwards, although the rule was never embodied in the manual of survey until 1890.”

To the same effect is the case of Smith (18 L. D., 135-136).

If the Court takes judicial notice at all of these matters, it must take notice of them in full, which, evidently, the Court did not do when considering its decision in this case. The Court should further have taken judicial notice of the fact that nowhere throughout its entire length is the Kansas River less than three chains in width.

As the Court was taking judicial notice of facts supposed to be determinative of the title to real estate and as part of the facts so considered took notice that in early territorial days (sic.) it was navigated, “a few steamboats going up and down its waters,” it might also with propriety (for the title to real estate was at issue), in connection with the doings of such steamboats, have followed

up the history of the voyages in question. Had the Court been fully and properly advised in that connection it would most certainly have discovered, as matters of contemporaneous history, that the majority of the venture-some craft had gone down *in*, not *down* the river. The learned Judge would have discovered that the bones of the boat which ventured farthest, viz., one which on a temporarily high stage of water reached the vicinity of Fort Riley, still calmly and peacefully slumbers in its bed composed of the sands of the river at the "Devil's Bend" or "Devil's Elbow" in the stream under consideration. That the "Hartford," historical boat, noted for its bringing the Manhattan colony up stream to its new home, labored for three solid weeks to travel from the mouth of the river to the mouth of the Blue, a distance of one hundred miles, or thereabouts, thus achieving an average distance of five miles or thereabouts per day, but in fact making progress only as flood waters caused by local rains enabled it to drag itself over the interminable sand bars: that this boat remained tied to a cottonwood tree about the mouth of the Blue from June until the following February or March, at which time an unexpected rise in the river enabled it to get as far down stream as the vicinity of St. Mary's Mission where, its false ally, the water, deserting it, the poor thing perished miserably *in a prairie fire*. The Court would also have been informed that a certain boat advertised to "travel on heavy dew," gave up in despair after a couple of attempts to navigate the Kansas and that such of the others as did not fall to pieces for lack of water to take them off the sand bars, disgusted with the failure of their endeavors, retired from the venture and that so ended the voyages to which

the Court refers. The Court might further have taken judicial notice of the fact that all of these attempts at navigation were made at flood period of the year, when the precarious visitations of the rains filled the channel to many times its normal depth, and that even under these conditions, it took several weeks to make the comparatively short voyages attempted by these boats of shallow draft, and that it was an ordinary occurrence even at such times that boats would be compelled frequently to tie up and await another freshet to carry them a short distance on their way.

Had the Court been in possession of such historical information, we wonder whether, taking due judicial notice thereof, the stream would have been adjudged navigable in fact. The Court also notices that in the year 1857 the Legislature of the *Territory of Kansas* chartered two navigation Companies. Had the Court inquired as to whether those companies ever navigated, the history of the day and of the years following up to the time of the rendition of the decision, would have answered "nay," and that for the very good reason that the river never admitted of practical navigation. The Court further notices that in its natural condition the stream contains such a volume of water as to render it capable of use for the purposes of navigation. It must be kept in mind, however, that the inquiry was being conducted as to a part of the river in the vicinity of its junction with the Missouri (L. c. 685), *viz.*, Kansas City and Wyandotte. Now the Missouri is a navigable stream in the popular sense, subject to regular periodic rises in its waters, which rises, the Court should also have judicially noticed, caused the waters of the Kansas to back up stream past the land there in controversy. If the volume of water judicially noticed by the Court persisted through-

out the stream, a very pertinent inquiry would have been "Then why did not the attempts made at its navigation prove successful?" and the answer could and would have been given in two words "insufficient water."

Counsel do not presume to imagine that this recital of the fate and experiences of the boats attempting the navigation of the Kansas River will now be accepted as actual facts by this Court. The recital is made solely for the purpose of showing what might and probably would have been proven had the parties interested in the Wood-Fowler case and in the case at bar, been permitted to further enlighten the Court in connection with matters of which judicial notice was taken. The Court considering any, should consider all such facts. The "hide," we think, should go with the "tail," and Counsel, if given the opportunity, will take pleasure in submitting the evidence on which they base such recited facts, and feel reasonably sure that the result will not be quite as favorable to the claim of navigability in fact as was the decision rendered by the Court. It is worthy of note in this connection that the time when the attempts at navigation referred to by the Court, were made, is not mentioned. As a matter of general history, they took place before Kansas became a state. No attempt to navigate the stream after Kansas was admitted as a State nor for some time before has ever been made. The questions of the rights of the State based upon any alleged navigability of the streams should be considered as of January 29, 1861, the date of Kansas becoming a State. If she can claim under and through conditions existing in territorial days and non-existent at the date of statehood, then must she also be bound by territorial legislative action under authority of the act of organization and acknowledge the binding force

of the Acts of 1855 and 1859, adopting the common law as it existed at the fourth year of James the First. As a matter of fact the State did solemnly approve of and adopt the territorial action, as witness her constitutional provision hereinbefore referred to continuing such statutes in force and her legislative re-enactment of those Statutes by the Act of 1862.

The Court in *Wood v. Fowler*, refers to the Act of 1864 declaring the stream non-navigable and observes, "but the plain implication of the act is that the streams had theretofore been considered navigable." Had the learned Judge who wrote the opinion been acquainted with the physical characteristics of some of the streams affected by the act, he would never have made the observation referred to. The Smoky Hill, for example, one of the rivers referred to in the act, might make fair sailing for a mud turtle, but anything of greater bulk or draft of water would certainly find pretty hard sailing. In the much more recent case of *Kregar v. Fogarty*, the Supreme Court of Kansas (78 Kas., l. c. 547, decided in 1908), says considering this act:

"Chapter 97 of the Laws of 1864, declaring the Smoky Hill and other rivers not navigable, does not conclusively establish the fact that they were navigable before, although affording an *implication* that they had theretofore been *so considered*."

Dana v. Hurst, 86 Kansas, 947, was decided upon a record of such scantiness as to cause one to wonder at the patience of the Court in giving any greater consideration to the questions presented than Counsel gave to the preparation of the case, and the attention of the Court is most respectfully directed to the fact that Chief Justice Johnston dissented, in which dissent, after a rehearing allowed, he was joined by Mr. Justice Benson.

In what does navigability consist for the purposes of determining land titles?

Wood v. Fowler, l. c. 688, recognizes a doctrine of the common law which many courts overlook and which was largely ignored in the decision of the case at bar, though of the utmost importance in the determination of land titles. The Court say:

“It is true a distinction was recognized in England and that streams were considered navigable only insofar as they partook of the sea, and to the extent that their waters were affected by the ebb and flow of the tide, and only so far was the title of the riparian owner limited to the bank, above such point, even though the stream was large enough to be used, and in fact was used for purposes of navigation, the riparian owner owned the soil, *ad filum aquae*, so that really there were three distinct classes of streams recognized: First, those smaller streams, which could not be used for any purpose of navigation, in which the title to the soil was in the riparian owner and along which the public had no rights of highway or otherwise; an intermediate class, in which the riparian owner owned to the middle of the channel and along whose stream the public had all rights of highway; and third, that which was called technically the navigable stream, where title to the bed of the stream was in the sovereign.”

This is the true rule of the common law, and by virtue of the statutes of 1855 and 1859, Territory of Kansas, was the law of the land at the time the title to the Gardiner tract passed out of the United States.

The doctrine is fundamental, says Kent:

“By the common law only those rivers were deemed navigable in which the tide ebbs and flows and ‘grants of land bounded on rivers, or upon margins of the same, or along the same above tide waters, carry the exclu-

sive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in cases where the river is navigable for boats and rafts, have an easement therein or a *right of passage as a public highway*."

3 Kent's Commentaries, 428.

Judge Wardlaw, in *McCullough v. Wall*, 4 Richardson, l. c. 84, quotes Kent as above and, considering the same question, says, speaking for the Court (l. c., 85):

"Perhaps the principal occasion for dispute on the subject has been the use of the term *navigable*, which has a popular signification different from the technical one which is given to it by the common law. * * * Arguments on both sides, drawn from considerations of policy and the law of other countries, have been addressed to us. On one side are commendation of the common law rule, for its wisdom and careful protection of all rights involved, *its adoption* by many of our sister states which are traversed by large fresh water rivers, its certainty and the unquestionable authority on which it rests," etc.

In this class of cases *Clark v. Allaman*, *supra*, belongs and by its effect as a decision of the Court of last resort, ranges Kansas on the side of those states.

In the case of *Deerfield v. Arms*, 17 Pick (Mass.) l. c. 42, a case calling for determination of rights of riparian owners in accretions and islands forming in the bed of a stream and, therefore, directly in point, Shaw, C. J., says:

"In the first place it seems very clearly settled that, upon all rivers not navigable (and all rivers are deemed to be not navigable above where the sea ebbs and flows)" etc. •

The ebb and flow of the tide did not, at common law, absolutely determine navigability. It was, in truth, strong presumptive proof of navigability, but navigability was a question of fact merely, whether the tide ebbed and flowed in the water course or not.

State v. Pacific Guano Co., 22 S. C., 50 (1885);

Cates v. Wadlington, 1 McCord, (S. C.) 356;

Mayor of Lynn v. Turner, Cowp., 86.

The flowing of the tide, though not absolutely inconsistent with the rights of private property in a creek is, strong *prima facie* evidence of its being a public navigable river.

Miles v. Rose, 5 Taunt., 706, per Gibbs, C. J.

And see, as supporting the same doctrine

State v. Duncan, 1 McCord, (S. C.) 404.

And in that State (South Carolina), ownership of lands upon fresh water rivers carries title to the thread of the stream.

McCullough v. Wall, 4 Rich., (S. C.) 84.

In *Executors of Cates v. Wadlington*, *supra*, the Court recognizes the rule that rivers in fact navigable, or capable of being made so, but not tidal, are public highways. This case also cites Lord Hale (Hargrave Law Tracts, 9), on the proposition that such is the common law.

The beds of fresh water streams, whether navigable or not, stand upon the footing of land not covered by water and were held only to be granted.

State v. Pacific Guano Co., 22 S. C., l. c. 55.

The rule as to tidal streams is presumptive only and may be rebutted by showing that the conditions and objects of navigation do not exist.

Id., l. c. 56.

The case of *Palmer v. Mulligan*, 3rd Caines (N. Y.), is very instructive as showing how even on such rivers as the Hudson the common law applied. Chief Justice Kent, delivering the opinion of the Court, says (l. c. 319):

“In Sir Matthew Hale’s excellent treatise *De Jure Maris, etc.* (Hargrave Law Tracts), and which is considered by Mr. Butler as exhausting the whole law on the subject, he lays down the law generally that ‘fresh rivers of what kind soever do of common right belong to the owners of the adjacent soil,’ but he admits that fresh rivers, as well as those in which the tides ebb and flow, may be under the servitude of the public interest and may be of common or public use for the carriage of boats, etc., and in that sense may be regarded as *highways by water*. Thus, he adds, the Wey, Severn, Thames, etc., as well above as below the flowing of the tide, and as well in the parts where they are of private as of public property are *public rivers juris publici*, and nuisances and impediments therein are liable to be punished by indictment. They are called public rivers, *not in reference to the property of the river*, but to the public use. (Hargrave, pp. 5, 8, 9). This is the true and just rule which harmonizes private right with the public interest. The Hudson at Stillwater is capable of being held and enjoyed as private property, but is, notwithstanding, to be deemed a public highway, for public uses,” etc.

In the case of *Lorman v. Benson*, 5th Mich., (4 Cooley) 18 the title to the bed of the Detroit River was in question. The Court, referring to the use of the term “Navigable,”

in connection with the title to the land constituting the bed, express their opinion as follows (pp. 25-26):

“There are no tidewaters within this State, and, therefore, no waters which, by technical meaning of the term ‘navigable’ at common law, would come within it. But we have more than a thousand miles of external boundary waters, which are open to navigation in the popular sense and many interior streams valuable for purposes of public convenience and passage. The inquiry before us is, whether our circumstances require the common-law rule to be so modified as to apply the doctrines belonging to tidewaters, navigable in common law sense, to these waters which are beyond the tidal influence.

There are, in England, two kinds of water highways. *All rivers and streams above the ebb and flow of the tide*, which are of sufficient capacity for useful navigation, are *public rivers* and subject to the same general rights which the public exercise in highways by land, to which Lord Hale aptly likens them. In these streams the adjacent proprietor *owns the banks and bed* and has a right to make such use of this land as will not interfere with the public easement of servitude.” (Id., l. c. 26-27.)

“When, therefore, we look at the state of the common law upon the subject before us, it is very evident that the ebbing and flowing of the tide, and not the *mere susceptibility of the stream to purposes of useful navigation*, has made the distinction between rights of riparian owners on the *fresh* and *tidal* public streams of England, and that, where these happen also to own the shore on tidal-waters, their ownership is not distinguishable for any useful purpose, if at all, from their dominion over the beds of *fresh water public rivers*.

In both kinds of public streams the rights of navigation were the same, and so far, the public at large had no interest whatever in the question of ownership of the bed of the water.” (Id., l. c. 30.)

“Considering the high esteem in which navigation was held in England, we are sure no principle would

have been allowed to grow up into the common law which would materially impair the shipping interest. *And the adjudged cases recognize the common-sense doctrine that it did not matter who held the fee of the property, as long as the public easement was maintained.*" (Id., l. c. 31.)

"In applying the principles of the common law to the tideless stream in question, we do not perceive what public interests would be subserved by placing it on the footing of tide waters, when the rules applying to fresh water streams provide amply for every common easement. The right of navigation, to which all others are subservient is in no way injured or abridged by this holding. * * * We think that in this respect the common law is already adapted to our circumstances and needs no changing." (Id., l. c. 32.)

That this ancient law was in force in all its vigor prior to the enactment of the statute of 1868 is shown by the paragraph of the opinion in *Clark v. Allaman*, *supra*, below quoted. The Court (and it must be remembered that the opinion is unanimous), say (71 Kas., l. c., 229):

"What is true of the system must be true of each rule which it embraces, and the common law rules relating to riparian rights, became the law of Kansas for every stream within its borders."

Judicial legislation.

At this point it may not be out of place to direct attention to the condition presented and forced upon us by the action of the Supreme Court of Kansas in the case at bar. The enactment of the Territorial Statutes of 1855 and 1859 had absolutely annulled every rule, law or custom contrary to the common law as it existed in the fourth year of James the First. (*Clark v. Allaman*, *supra*.) No other system of laws, or any law other than statutes which might be en-

acted by the Territorial legislature, existed within the Territory. There were no territorial statutes specifically or even indirectly governing or adverting to titles of riparian owners on streams of the Territory. If, therefore, the common law, as adopted, was not applicable and did not govern such titles, and the Legislature had not supplied the want, what law did govern? By her constitutional adoption of the statutes in question and by their express re-enactment by the State Legislature in 1862, the State found herself in precisely the position as that theretofore prevailing in the Territory in this regard. The decision in *Wood v. Fowler*, *supra*, does not answer the question, since the law of 1868 was in force then and it did not appear *when* the title under consideration in that case passed from the United States. Neither does *Dana v. Hurst*, *supra*, for precisely similar reasons, answer the question. It would, in fact, appear, admitting inapplicability of the common law, that there existed *no law* on the subject. But this peculiar condition did not disturb the Attorney General for, in his petition, he claims *all* waters of the State as the property of the State and the Supreme Court sustains his view by sustaining his demurrer. A rather novel combination of legislative bodies—The Attorney General plus the Supreme Court, for most certainly the result of the decision is to provide a law where none before existed. Legislation pure and simple. It would seem as though the divorce between the Legislative and Judicial functions had not, in this instance, been very effective.

Navigability in fact.

By many of the decisions which either ignore or overlook the distinction between the use of the term “naviga-

bility" in its general, popular sense, and its use technically for purposes of determining real estate titles, navigability in fact is made the determining factor. What the law recognizes as navigable utility, then, becomes an important question and, of course, must be determined as other questions of fact are determined. While in *Wood v. Fowler*, *supra*, the Supreme Court of Kansas took judicial notice of the navigability of the stream, there being no question before the Court concerning any part of the stream but that immediately adjoining the land of the plaintiff, the effect of the decision cannot be extended to a point many miles away and not then involved in the controversy. The writer of that opinion, however, in delivering the opinion of this Court in the case of *United States v. Rio Grande Dam & Irrigation Company*, 174 U. S., 690, very materially limits the apparent authority of *Wood v. Fowler*, in these words (l. c. 698):

"It is reasonable that the Courts take judicial notice that certain rivers are navigable and others are not, for these are matters of general knowledge. But it is not so clear that it can fairly be said in respect to a river known to be navigable, that it is, or ought to be, a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether courts will take judicial notice of that fact. It would seem that such a matter was one requiring evidence and to be determined by proof. That the Rio Grande, speaking generally, is a navigable river, is clearly shown by the affidavits. It is also a matter of common knowledge and, therefore, the Courts may properly take judicial notice of that fact. *But how many know how far up the stream navigability extends?* Can it be said to be a matter of general knowledge or one that ought to be generally known? If not, it should be determined by evidence." (Italics ours.)

The rule of judicial notice of navigability of streams and as to conditions under which the Court will take such notice, is again stated, and the rule of *Wood v. Fowler* further limited, by the decision of this Court in *Donnelly v. United States* (228 U. S., 243-262), opinion on rehearing (p. 708), in which Mr. Justice Pitney, speaking for the Court, says (p. 709):

“It is conceded that whether the Klamath is navigable at the place where the homicide occurred is a question of fact. Of course the tide ebbs and flows at the river’s mouth, but the *locus in quo* is approximately 25 miles from the mouth, and quite beyond any influence of the tide. As the opinion points out, there was evidence tending to show that the stream was navigable at certain seasons from Requo (near its mouth) up to and above the *locus in quo*. But the evidence was by no means conclusive. It showed an apparently irregular traffic, in times of high water only, employing Indian canoes, dug-outs, and at certain times small steamboats and gasoline launches. In this state of the evidence the trial court could not, nor can we, take judicial notice of the stream being navigable in fact.”

This Court has said:

“Those rivers must be regarded as public navigable waters in law which are navigable in fact. And they are navigable in fact when they are used, or susceptible of being used in their ordinary condition, (sic.) as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”

The *Daniel Ball*, 10 Wall. 557.

If then, it is not a fact so notorious as to be generally known, that a stream is susceptible of being used, or is in fact used, in its natural condition, as a highway of commerce over which trade and travel are or may be conducted;

whether it is so susceptible becomes a matter of proof, and where that fact is put in issue in a pending proceeding in a court of competent jurisdiction by a proper pleading, the party so pleading is entitled to a hearing in due course of law. To refuse him such a hearing is to deny him the constitutional right of the protection of equal laws and of the equal protection of the laws, and should the decision adversely affect his property rights, deprives him of his property without due process of law.

In the case of *The Montello*, (20 Wall., 430), Mr. Justice Davis, delivering the opinion of the Court, thus defines navigability in fact (l. c. 441):

“It would be a narrow rule to hold in this country unless a river was capable of being navigated by steam or sail vessels it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said: (*Rowe v. Bridge Co.*, 21 Pick., 344): ‘every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.’”

Commenting on “*The Montello*” and the “*Daniel Ball*,”

cases, Mr. Justice Shiras, in *Leovy v. United States*, (177 U. S., 631-632), said:

“It is a safe inference from these and other cases to the same effect which might be cited, that the term ‘navigable waters of the United States,’ has reference to commerce of a substantial and permanent character to be conducted thereon.”

And the Court held that evidence of the occasional passage of a small vessel carrying oysters and one or two cargoes of willows and timber was not sufficient to establish navigability.

In *United States v. Rio Grande Dam & I. Co.*, (174 U. S., 690), applying the rule of the same cases, Mr. Justice Brewer said (p. 699):

“Obviously, the Rio Grande within the limits of New Mexico is not a stream over which, in its ordinary condition trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purpose of transportation has been and is exceptional and only in times of temporary high water. The ordinary flow of water is insufficient.”

It must be borne in mind that the writer of this opinion is the same who penned that in *Wood v. Fowler*, *supra*.

To meet the test of navigability as understood in the American law, a watercourse should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable, is not sufficient. While the navigable

quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability might be depended upon. Mere depth of water without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a watercourse must have a useful capacity as a public highway of transportation.

Harrison v. Fite, 148 Fed., 781-783-784.

Applying the rule to the facts of that case, the Court approved the conclusion of the trial court that Little River, in Arkansas, is not navigable in any real and substantial sense. Of the evidence, the Court said (p. 787):

“Witnesses testified that in times of high water there had been no successful navigation of it in recent years, except with a gasoline launch drawing but a few inches of water, and dugouts of hunters and fishermen; that it is not being used to float the products of the fields and forest to market, and cannot be profitably and successfully used for that purpose.”

Referring to the statutory provisions governing surveys of the public lands (U. S. Rev. Stat., 1878, Sec. 2395) and the section of the statutes declaring that all navigable rivers shall be deemed public highways (1 U. S. Stat. at Large, p. 468), and Sec. 5251 of the Revised Stat. U. S., 1878, providing that all navigable rivers and waters in the former territories of Orleans and Louisiana “shall be and forever

remain public highways," the Supreme Court of Kansas, in *Kregar v. Fogarty*, 78 Kans., l. c. 544, say:

"The argument deduced from these provisions is that when a survey of lands bordering on a river is duly made and approved, showing that such stream was meandered, as provided by these statutes and the regulations of the general land office, such stream is thenceforth considered navigable as matter of law, whether navigable in fact or not: And, being so navigable the title to the bed of the river is in the State. As this conclusion rests upon a federal statute, we may properly look to the federal decisions for authority. This matter was considered in a recent case in the Circuit Court of Appeals involving title to the bed of the Little River, in Arkansas. The plaintiffs were the owners of land adjacent to and abutting upon the meander line of the river as shown in the government survey, and by virtue of such ownership, claimed title to the bed of the stream, upon the ground that it was not navigable, and sought to enjoin the defendant from hunting and fishing thereon. The defendant claimed the river was navigable, its status having been fixed by the survey. Some evidence was also given to show that it was navigable in fact. In the course of the opinion Judge Hook said:"

(Here the Court quotes the extract from *Harrison v. Fite*, elsewhere above set out.)

Character of proof required.

Navigability is a matter of judicial knowledge, aided by public records and historical writings. Ordinary evidence as to navigable capacity is also admissible and may be required to determine the point at which a stream of known navigability ceases to be navigable.

In *The Montello*, (11 Wall., 411, 414, 415) the Court, by Mr. Justice Field, say:

"We are supposed to know judicially the principal features of the geography of our country and, as a part of it, what streams are public navigable waters of the United States. Since this case was presented we have examined with some care such geographies and histories of Wisconsin as we could obtain from the Library of Congress, to ascertain, if possible, the real character of Fox River and to render the fiction of the law as to our supposed knowledge of the navigable streams in that State, a reality in this case; but from such examination we are still in doubt. • • •

As the decree must be reversed and the cause remanded to the court below for further proceedings, the parties will be able to present, by new allegations and evidence, the precise character of Fox River as a navigable stream."

In *Illinois v. Economy Power Co.* (234 U. S., 497, 512), in which Mr. Justice McKenna delivered the opinion, it was "shown by early explorations and discoveries that the Des Plaines River was navigable from a point near where is now situated the City of Chicago to its mouth."

In *United States v. Mackey* (216 Fed., 126), the Circuit Court of Appeals for the Eighth Circuit reversed the decision of Judge Campbell (214 Fed., 137), in one of the cases now under consideration, the Court, by Judge Carland, saying (p. 128):

"The United States has never at any time had an opportunity to show by evidence that the allegations contained in paragraph 3 of the bill were true. On the contrary they have been turned out of Court by a finding that the Creek Nation had no right or interest in the land, and this is not upon any showing of the United States, but upon a case gathered from the world at large. • • •

Voluminous documents are presented in the brief

of counsel for the Pollard-Hagan Oil Co., of which it is claimed the Court below and this Court take judicial notice. We apprehend, however, that in order to enable the court to sustain a demurrer to a bill by reason of matters of which it took judicial notice, it would require a very clear case, and we are not satisfied that this is such a case."

It is very noticeable that nowhere, in any Kansas case, is there reference made to any definite time of alleged navigation of the Kansas River, except insofar as the reference "that in early territorial history it was, in fact, navigated, *a few steamboats going up and down its waters,*" on page 688, 26 Kas., *Wood v. Fowler*, may be considered such. There is no word in Kansas history, or elsewhere, which even tends to show an attempt at navigation during the year 1859 or subsequent thereto. Investigation of the records of these few steamboats which went up and down its waters would have, in fact, disclosed that only in time of unusual high water was the attempt made. Now under the provisions of the statute hereinabove quoted (Ch. 29, Sec. 9, 1st Sess., 4th Cong., 1796), provision is made for the vesting of titles to the beds of streams not navigable, in the beneficiaries of patents to the adjoining lands. There is left no discretion to the States. The property right passes to the riparian owner with the issue of the patent. Such being the case, it follows of logical necessity that where the title to realty is involved inquiry as to the character of the stream *must be confined to the period of the issue of the patent*. Inquiry as to navigability or non-navigability must be had as of that general period. That changes may take place in the bed and character of a stream which theretofore may have had a different character, is fully recognized by the

Courts. Says the U. S. Circuit Court of Appeals in *Harri-son v. Fite, supra*:

"It does not follow that because a stream or body of water was once navigable, if it has since continued and remains so. Changes may occur, especially in small and unimportant waters, from natural causes such as the gradual attrition of the banks filling up the bed with deposits of the soil; the abandonment of use followed by the encroachment of vegetation and the selection by the water of other and more convenient channels of escape that work a destruction of capacity and utility as a means of transportation and, when this result may fairly be said to be permanent, a stream or lake in such condition should cease to be called among those waters that are charged with a public use." (cited in *Kregar v. Fogarty*, 78 Kas., l. c. 545.)

And if on account of such a change the stream had been unnavigable at the date of the issue of the patent, though theretofore the waters had been navigable can it be doubted that by virtue of the statute the title to the bed would pass to the patentee of the banks.

That the Supreme Court of Kansas recognizes the possibility of such an occurrence even in large rivers of importance is shown by reference to *Dana v. Hurst, supra*, wherein it is said (l. c., 948): "*It is not pretended that the river (the Arkansas) is now navigated or navigable in fact, in Kansas, and the Court, as well as everybody else, knows that it is not.*"

If such be the fact, does it not become of the utmost importance that it be determined whether the stream was, in fact, navigable, at the date of the issue of the patent? Will the court be authorized to take judicial notice of the day or hour when a stream became, or ceased to be, navigable, in fact? The history of Kansas will disclose just such cases, especially at the occurrence of the great flood

of 1903 as a result of which the Kansas and Blue Rivers changed their course within the hour and left their old channels a mere trickle of gradually decreasing waters. Would it not then be the fairer and wiser course in all cases of dispute, and more in conformity with judicial dignity, to initiate inquiry and receive evidence, as to the character of the stream as to navigability in fact or otherwise at the date when the rights and titles of claimants are claimed to have attached. If, indeed, the stream was not then navigable in fact, the title having attached with the issue of the patent, no change thereafter occurring could possibly destroy that title or transfer it to the State, and that such is the law, the Supreme Court of Kansas fully recognizes, saying, in *Wood v. Fowler, supra*, l. c. 688:

“Indeed, where title is once vested, a mere change in the character or condition of the current, or the uses to which the stream is put, will not transfer any title.”

In disposing of public lands bordering upon rivers it is not the policy of the government to reserve title to the lands under water, whether the stream is navigable or not (*Kregar v. Fogarty, supra*, l. c. 545), so that nothing was withheld by the general government in making the grant.

If, then, as a matter of fact, the stream was not navigable in fact prior to and at the time of the issue of the patent, the title to its bed vested in the riparian owners and, as the effect of the decision of the Kansas Supreme Court in this case is to hold the title to the lands claimed by defendants (plaintiffs in error), as vested in fee in the State, the defendants by force of the decision have been deprived of their property without due process of law and their property has been taken for public use without com-

pensation. Wherein and whereby they have been deprived of constitutional rights secured to all citizens of the United States by the supreme and fundamental law of the Union.

Significance of meander lines.

The fact that the Kansas River was meandered is no evidence of its navigability. The Kansas and Oklahoma decisions and the representatives of the State Government in this case, attach much importance to the fact that the Kansas River was meandered by the Government surveyors in the making of the surveys of the public lands. It is claimed that this amounts to a declaration of navigability by the Interior Department.

If it were assumed that the surveyors acted under instructions to meander only navigable streams, yet this could not be taken as a departmental determination of navigability. It is beyond the power of a Government surveyor or of the Land Office to determine this question. The making of a meander line has no certain significance.

Kean v. Calumet Canal Co., 190 U. S., 452, 459;

Iowa v. Rood, 187 U. S., 87, 93;

Harrison v. Fite, 148 Fed., 781, 784;

Ross v. Faust, 54 Ind., 471.

But the Government surveyors were not so instructed. The Manual of Surveying Instructions, issued by the General Land Office since 1890, embodying that which has always been the uniform practice under special instructions, provides the following:

“Navigable rivers, as well as all rivers not embraced in the class denominated ‘navigable,’ the right-angle width of which is 3 chains and upwards, will be meandered on both banks at the ordinary mean high-water mark.”

In the case of *Furher* (12 L. D., 556) the North Fork of the Canadian was held to have been improperly meandered in the survey of 1871, because it was less than 3 chains in width. In that connection the Secretary of the Interior, in communicating his decision to the Commissioner of the General Land Office May 29, 1891, reviewed the history of surveying instructions issued by the Land Office, and said (p. 557):

"It appears, however, although not referred to in the manual of 1855, that it has been the practice of your office for many years to restrict the meandering of streams to those in which the right-angle width is greater than 3 chains, special instructions in relation thereto were issued when the contract for surveying was made.

In a review of the facts above set forth, it appears that the uniform practice of the Land Office has always been to limit the meandering of streams to those having a right-angle width of three chains and upwards, although the rule was never embodied in the manual of survey until 1890."

To the same effect is the case of *Smith* (18 L. D., 135, 136.)

As the Kansas River is everywhere more than 3 chains in width, the surveyors were required to and did meander it, irrespective of its navigability.

The action of the government surveyors in meandering a body of water or in surveying its bed is to be considered as evidence upon the question of its navigability or unnavigability *at the time* but is not conclusive. The surveyors are invested with no power to foreclose inquiry into the true character of the water. If the United States have disposed of lands bordering upon a meandered unnavigable

water course or lake, by a patent containing no reservations, and there is nothing else indicating an intention to withhold title to lands within the meander lines, it has nothing left to convey, etc.

Niles v. Cedar Point Club, 175 U. S., 300;

Harrison v. Fite, 148 Fed., 781-783-784;

Hardin v. Jordan, 140 U. S., 371.

The reason for following the sinuosities of the river bank in making the survey is to ascertain the quantity of land to be paid for, and not to determine the navigability of the stream, although being done by public authority, such meandering affords some evidence of the fact of navigability.

Kregar v. Fogarty, 78 Kas., l. c. 546.

Citing *Toledo Liberal Shooting Company v. Erie Shooting Club*, 33 C. C. A., 223, wherein certain overflowed lands, or shallow waters known as 'Maumee Bay' had been surveyed and patented as swamp land; the Court saying (l. c. 681):

"The fact that this so called 'bay' was surveyed and patented as swamp land by the Government affords a strong presumption against the navigability of the water thereon."

Commenting on which statement, the Supreme Court of Kansas, in *Kregar v. Fogarty*, *supra* (l. c. 547), observes:

"The Court thus gives to the survey the effect of a presumption only. To give to the hastily formed opinion of a surveyor who in the course of his arduous work, often in the wilderness, encounters a stream he may never have seen before, the effect of an adjudication concluding for all time the question of its naviga-

bility, as respects the rights of riparian owners, is a proposition to which we cannot assent. * * * There is no legal fiction that a stream not navigable in fact is still to be held navigable as a matter of law. There is no such unseemly conflict between fact and law."

Surveyors of United States public lands cannot affect the application of the law that the title to the bed of non-navigable streams is in the riparian owners by assuming to determine whether the stream is navigable and running lines along the bank so as to exclude the bed of the stream.

Ross v. Faust, 54 Ind., 471.

Wood v. Fowler again.

The learned writer of the opinion in this rather remarkable case, was careful to confine its effect to the point in the stream then in controversy:

"So that for all purposes of this case, and any questions in it, we may assume (sic.) that the Kansas is, *at the point in controversy*, a navigable stream."

26 Kans., l. c. 688.

Notwithstanding which very patent fact, the Court in the case at bar, seizes upon the decision as a final adjudication as to the navigability of the stream as a whole, and this for the purpose of disposing of the claims of the plaintiff in error to ownership of the land beneath its waters under a grant from the United States.

On the same page (688), reference is made by the Court to an Act of the Kansas Legislature passed in the year 1864, whereby the Kansas River was held non-navigable, and the Court considering the act, said:

"But the plain implication of the act is that the streams had theretofore been considered navigable."

We respectfully represent that the enactment might just as clearly have been considered as a legislative determination of a fact for the purpose of setting at rest any questions which might arise, or have arisen, with reference to the titles to its bed. Be this as it may, however, attention is directed to the fact that the Court deems its probative force an *implication* merely; and again discussing the act some twenty-six years later, the Court observed:

“Chapter 97 of the Laws of 1864, declaring the Smoky Hill and other rivers not navigable does not conclusively establish the fact that they were navigable before, although affording an *implication* that they *were so considered*,” etc.

Kregar v. Fogarty, 78 Kas., l. c. 54, but by whom they were so considered, or what effect should be given to such consideration the Court does not inform us.

It has heretofore been adverted to that the Kansas Supreme Court recognizes that, as a matter of common law, there were three classes of rivers recognized for the purpose of adjudicating titles. Of these one class consisted of waters navigable in fact but above the effect of ebb and flow of the tide. Granting for the purposes of this argument that the Kansas River was so navigable in fact, and keeping in mind that the common law was by statutory enactment, in force in the State, then such a case was presented for consideration as made it wholly unnecessary to determine the ownership of the bed of the river. The title to such bed is not necessarily in issue. By reference again to *Clark v. Allaman* (71 Kas., 206), we find it the settled law of the State, *by adoption of the English Common Law*, that there can be no property right in the waters of streams while in their beds. Applying the same common law, we

find that if the Kansas belonged to a class of streams above referred to, the public had a right of passage over it. Through being on its waters, no matter what condition the latter were in, there could no question of trespass arise. Since there could be no ownership, or even use, in waters not reduced to possession, the ownership being in the public, or in the State as the representative of the public (*Wood v. Fowler*, l. c. 690), the plaintiff had failed to make his case at law or in equity, and the decision of the Court as to the ownership of the bed was unnecessary and pure *obiter*.

On motion for rehearing, this Court, in *Donnelly v. U. S.*, *supra*, withdrew part of its original opinion under a very similar state of facts, l. c. 709-711.

It is most respectfully represented that the case at bar if viewed in the light of an attempt to uphold the right of the Kansas Legislature, legislatively to determine the title to the waters and streams of Kansas regardless of the rights and interests of the riparian owners along these streams; or as a decision of the courts of the State whereby the riparian owners are deprived of the right to prove their interests, if any such they have, in the beds of those streams, presents a situation unequaled in the history of American law, constituting, as it does, when viewed in either light a flagrant spoliation of private property forbidden by the Constitution and void.

See *People v. Economy Power Co.*, 234 U. S., 497, l. c. 522, l. c. 241 Ill., 290.

We much prefer to consider that the Court erroneously deemed the act applicable to the defendants in error and

their property rights and upon such erroneous view rendered the decision appealed from.

Has the State a property right in moving sands in the waters of a navigable stream?

The nature of the substance which is affected, or intended to be affected, by the legislation here in question, together with the rights of the people in connection therewith, are presented by the returns for consideration by the Court.

As we have seen, in a case of his description, the motion to quash serving the purpose of a demurrer, all things well pleaded in the return must be taken as true for the purposes of the motion. Therefore, as we conceive the facts with reference to such sand to be well pleaded, it stands admitted that:

“The sand and gravel in said Kansas River never have been and are not now fixed or immovable and never have formed and do not now form any regular, stable and fixed and immovable stratum or strata; but on the contrary, said sand and gravel at all times within and beyond the memory of man have been and yet are shifting, migratory, elusive and fugitive in their nature, mixed and moving with the waters of the river in the direction and with the flow of such waters and varying in speed, volume and progress with the rate of flow of the water in said stream; that such motion is not due to, or of the character of, natural erosion or disintegration of fixed land or strata, but results from a natural inherent law of the substance, a motion ever shifting, flowing and moving onwards and forward with the waters of said stream rendering such sand and gravel fugitive beyond confinement, and partaking more of the elusive and unstable character of the waters of said stream than of the strata of its fixed bed and banks. * * *

That in its natural condition of location such sand is commercially useless until separated from the waters of the stream; that its presence is injurious to navigation and, in fact, constitutes a nuisance, injurious to the common welfare; and that the people within the State have, at all times, had and exercised the common right to take this substance at their free will." (Trans. of Record, pp. 12, 13.)

The attributes of the substance as here given bring it well within the character of things *ferae naturae* and, we submit, the law applicable to such wild things must govern in the decision of this controversy. Herein is a question of abstract right, the right of the people to take and subject to the ownership of the taker natural things in which there is no property until reduced to possession, in which, prior to such reduction, there can exist no property, because of their very nature.

The ownership of wild animals, so far as they are capable of ownership, is in the State—not as proprietor, but in its sovereign capacity, as the representative of, and for the benefit of, *all its people in common*.

State v. Repp, 104 Ia., 305, 40 L. R. A., 687;

State v. Rodman, 58 Minn., 393.

That in International law, no such thing exists as a national right of property in a herd or body of wild animals, as a whole, apart from the ordinary right of property in each individual animal inhering in its custodian during the time that his possession lasts is supported by:

Behring Sea Arbitrators Decision, 32 Am., L. Reg., 901.

The law of this country is substantially that of England with regard to animals *ferae naturae*.

Rexroth v. Coon, 15 R. L., 35, 2 Am. St. Rep., 863.

One may acquire property in wild animals *per industriam* by reclaiming and making them tame by art, industry and education.

Churchward v. Studdy, 14 East, 249;

Manning v. Mitcherson, 69 Ga., 447, 47 Am. St. Rep., 764;

Fleet v. Hegeman, 14 Wend. (N. Y.), 42;

Gehn v. Rich, 8 Fed., 159;

Case of Swans, 7 Coke, 18a; 2 Bl. Comm. 391;

Taber v. Jenny, 1 Sprague (U. S.), 315.

The natural right to pursue and take any wild animal exists in every individual.

2 Bl. Comm., 403.

Property *ratione soli* is the right which every owner of land had at common law to kill and take all such animals *ferae naturae* as were, from time to time, found on his land.

Blades v. Higgs, 11 H. L. Cas., 621;

Sutton v. Moody, 1 Ld., Raym., 250;

Long Point Co. v. Anderson, 19 Ont., 487.

Where one has property *ratione soli*, the animal so taken becomes his absolute property.

Blades v. Higgs, *supra*;

Long Point Co. v. Anderson, *supra*.

That property right did not exist in animals *ferae naturae* until possession had been taken, though one might have an exclusive right (property *ratione privilegii*) is shown to be the law by the opinion of Lord Westbury in *Blades v. Higgs* (*Supra*, l. c. 631), and that such are not the subject of larceny (*Id.*, l. c. 635), per Lord Cranworth.

Lord Coke is very clear on the subject of ownership in such cases. In the case of *The Swans* (*supra*), he says:

"A man hath not absolute property in anything which is *ferae naturae* * * *. Property qualified and possessory a man may have and to such property a man may attain by two ways, by industry, (*propter industriam*), or *ratione impotentiae et loci*," etc.

Floating seaweed has been held to be property of this class.

Hampdon v. Kiry, 68 N. Y., 459;

Church v. Meeker, 34 Conn., 421;

Peck v. Lockwood, 5 Day, 22;

Mather v. Chapman, 40 Conn., 382;

Nudd v. Hobbs, 17 N. H., 527;

Hill v. Lord, 48 Me., 83-100.

In *Anthony v. Gifford*, 2 Allen, 549, Bigelow, C. J., in speaking of the right to seaweed, kelp and other marine plants:

"So long as they are afloat and driven or moved from place to place by the rising tide, it is wholly uncertain where they may find a resting place, and no one can claim ownership in them * * * and this is true whether they are wholly afloat, so that they do not come in contact with the bottom, or only partially so to such an extent that they occasionally, by motion of the waves, or by rise of the tide, touch or rest on the beach."

In the case of *Deckins v. Shaw* (Hall, Seashore, 2d Ed. App., 45, 60, 64, 65), Mr. Justice Bailey says (page 50), with reference to the fact that many persons had commonly taken sand from the beach:

"I do not think that it proves the right is not in the Crown, for in general, the Crown has the right, *not with a view to the private reservation to collect the stones for itself, or to collect the sand for itself, but for the general interest of the public; and if you can, without interfering with and prejudicing the interest of the public, remove the sand and the stones, the Crown will not interfere.*"

And see Hall on Seashore, 2d Ed., 92, 186 upon same proposition.

It appearing from these authorities that the public have certain rights which are of a nature so peculiar that they must be placed in a class by themselves, and that upon a high plane, it remains to be seen whether the legislature may, at its will and unrestrained, extend its authority over them to the extinguishment of the right. We are not prepared to admit that there exists any such power in the Legislature, nor will we admit that the negations contained in the Constitution are the limitation of what the Legislature may not do. There are higher and far more sacred rights of the people than mere property rights. Some of them have been grouped under the general designation "life, liberty and the pursuit of happiness." But these rights may, in the interests of the public be abridged, not so other rights which, while the citizen has the right to life, no legislation can deprive him of, even if legislation could act upon the *res*. Such legislation may be enacted to *protect* the right, but never to *invade* or *abridge* it.

Says Mr. Justice Brewer in *Wright v. Noell*, 16 Kans., l. c. 603:

"All political power is inherent in the people, and all powers not delegated, remain with them. These truths which lie at the foundation of all republican governments are distinctly asserted in our own bill of rights. (Secs. 2 and 20.) By the Constitution, the people have granted certain powers and to that extent have restricted and limited their own action. But beyond these restrictions, and *except as to matters guarded by absolute justice and the inherent rights of the individual*, the power of the people is unlimited."

Of necessity, this great jurist here decides that in matters guarded by abstract justice and the inherent rights of the individual, the people are without authority to limit or destroy them by legislation.

The right to breathe the free air of heaven, the right to take, for his sustenance, the wild fowl of the air, the wild animal of the mountains and the plains, and the fish of the waters; to take for the nourishment of his body the waters of the streams, the right to labor, and ownership of the work of his hands, are all of the character of natural rights which no legislation can abridge. By those rules which we call policy regulation the individual may, indeed, be restrained or prohibited from the commission of such acts as would, if persisted in, deprive the entire community or any large proportion of the community, of these rights, divine in their origin, or abridge or limit the general enjoyment of them, but such regulation is and can be supported solely upon the theory that the control is for the *preservation of the right* to the entire community.

As to these things, then, it is evident, there is a limit upon legislation. Does that limit extend further? We think it does. Where by common and immemorial custom

of the people, a right or privilege exists which is so interwoven with the preservation of life and the pursuit of happiness that it might be rightly called a right of necessity, it cannot be held that the community, without words of express grant, have vested in a delegate body the right to deprive the community or any part thereof of that right or to seriously abridge it. Of this character are the right to clothe oneself; the right to protect oneself from the inclemency of the weather by erecting and maintaining suitable shelter; and many others of like kind, among which has always been recognized the right to take and turn to useful account things of such character, that, because they have no fixed location and in the nature of things cannot have such, are held not to be in propriety until reduced to possession. Floating fish have this characteristic in addition to their value as food; so also have wild fowl and the beast which roams untrammelled.

Says Christian:

“But how or when, then, does property commence? I conceive that no better answer can be given than by occupancy or when anything is separated for private use from the common stores of nature. This is agreeable to reason and sentiments of mankind prior to all civil establishments.”

Labor of a man's body and work of his hands we may say are properly his. “Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labor with and joined to it something this is his own and thereby maketh it his property.”

Locke Govt., Ch., 5.

The first of mankind had in common all those things which God had given to the human race. This community

was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each have their particular portion. It was a community which those who have written on this subject have called "a negative community," which resulted from the fact that those things which were common to all belonged no more to one than to the others, and hence no one could prevent another from taking of these common things that portion he adjudged necessary in order to subserve his wants. Whilst he was using them others could not disturb him, but when he had ceased to use them, if they were not things which were consumed by the fact of the use, the things immediately re-entered into the negative community and another could use them. The human race having multiplied, men partitioned among themselves the earth. * * * Some things, however, did not enter into this division and remain, therefore, to this day, in the condition of the ancient and negative community.

Pothier, Traite du Droit de Propriete, No. 2.

The corpus of the water in a stream is of the class not so divided:

"This court has never departed from the doctrine that running water, as long as it continues to flow in natural course, *is not and cannot, be made the subject of private ownership.*"

Kidd v. Laird, 15 Calif., l. c. 179-180, and see

Clark v. Allaman, supra.

If the government which in this instance is the riparian proprietor, had granted to the defendants the right to divert from the creek a given quantity of water, without restriction as to the place of diversion, it is clear the right

could be exercised at any point on the stream, though the effect of the grant would not have been to convey any property in the corpus of the water, *for no such property is vested in the government.*

Kidd v. Laird, supra, l. c. 180.

Water flowing in a stream, it is well settled, by the law of England is *publici juris*. By the Roman law, running water, light and air were considered as *some* of those things which had the name of *res communes* and which were defined as "things the property of which belong to no person, *but the use to all.*"

Liggins v. Inge, 7 Bing., 682, l. c. 692-693; 20 E. C. L. Rep., l. c. 308.

"Under the common law the running waters of the earth are neither lands, tenements, nor hereditaments, nor are they susceptible of absolute ownership. Water under this condition is a movable wandering thing, and must, of necessity, continue common by the law of nature. It admits only of a temporary, transient, usufructuary property therein; and, if it escape for a moment the right of a former possessor is gone forever and he has no right to reclaim it. It is not capable of being sued for by the name of 'water,' or by calculation of its cubical or superficial measure, but the suit must be brought for the land that lies at the bottom, for so many acres of land covered by water. The grant of a stream of water, *eo nomine*, will not pass the land over which the water runs. * * * As water is not land, neither is it a tenement, because it is not of a permanent nature, nor the subject of absolute property, unless reduced to actual possession. Hence, water, being neither land nor tenement, and in no possible sense real estate, is not embraced by a covenant

of warranty. * * * Running water in natural streams is not property and never was. Even a government has no property *in the corpus of the water* while it is running in the natural streams. As was said in an early California case, '*No such property is vested in the government.*' "

Kinney on Irrigation and Water Rights, Vol. 1, 467.

From the character ascribed to the sand of the Kansas River, conclusively ascribed for the purposes of this motion, it clearly comes within the classification last named. Here at this hour, the next mayhap within the limits of a sister state; in Shawnee County today, tomorrow in Wyandotte; unlimited in quantity, impossible of destruction or even serious diminution, limited only in extent by the repeal on the part of the Almighty of the law of its production and existence, it of certainty cannot be held otherwise than one of those bounteous provisions of nature, essential to the welfare of the community and to the primary comfort of the people. Man uses it in the erection of his shelters, in the cultivation of the soil, in a thousand and one different ways to which its character and unlimited supply make it adaptable. It may be said that its presence is not an unmixed blessing, as it interferes seriously, nay in this instance, destroys, the navigability of a great natural highway. *Non constat* that it is not a blessing. Too much water, too much air, too much of other actual necessities of life have proved anything but a blessing. Some of our most productive lands once were so covered with timber, or water, as to render them valueless for cultivation; but who would have the hardihood to hold that the product of the forest or the natural element of water was not a necessity for our personal happiness and comfort and to our prosperity and advancement as a nation?

Referring to things which remain common, or in what he qualified "as negative community," Pothier continues (*Traite du Droit de Propriete*):

"These things are those which the juriconsults called *res communes*. Marcien refers to several kinds—the air, the water which runs in the rivers, the sea and its shores. * * * As regards wild animals *ferae naturae* they have remained in the ancient state of negative community."

And see Blackstone, Vol. 2, 14, 394.

This class of property in birds *ferae naturae*, is recognized in the case of the *State v. Saunders*, 19 Kansas, 127, which was a prosecution under a criminal statute which provided a penalty against anyone who should knowingly transport or ship or receive for shipment, any of the birds mentioned in the Act (in this case prairie chickens), in or out of the State. The Court held the Act unconstitutional because the birds, having been lawfully killed, *were property* and if received for interstate shipment, were subject of interstate commerce.

In considering this subject it must at all times be kept in mind that under our form of government, the State cannot subject to sole personal use, objects and subjects to which property rights might attach, as could the King in England; the same right of personal propriety cannot exist, because the State, as Sovereign, and in its collective capacity, cannot enjoy it. It is only by use in common, by enjoyment in common, each individual in his own right and to the extent of his own appropriation, that rights in this class of property can be enjoyed. The act here under consideration amounts, in fact, to a prohibition against converting into property that in which no one has a property right until reduced to possession. In other words, it is

compelling an inhabitant of the State to pay for the exercise of a right vested in him by the law of nature, one of those inherent rights of the individual referred to by Judge Brewer.

The Supreme Court of Wisconsin had this subject under consideration in 1892. In delivering the opinion of the Court (which was unanimous), Marshall, J., says:

“It has been universally supposed, we venture to say, that the right of every person within the State to enjoy its public waters for every legitimate purpose which does not interfere with the right of any other person to like enjoyment, subject only to such *mere police regulations* as the legislature may, in its wisdom, prescribe to *preserve the common heritage of all*, is a constitutional right of all persons within the State.

• • • It had not been supposed that the State could deal with public waters or *with any other thing* held upon a *like trust to that of such waters* as the absolute property of the State and used for purposes of revenue.”

Rossmiller v. State, 58 L. R. A., 97.

It is respectfully submitted that the Act in question is outside of the protection of the Constitution; that the right here claimed, by plaintiffs in error, is one of those natural rights, those inherent rights of the individual which the people never surrendered; that the Act therefore, is unconstitutional in that its adoption exceeded the powers conferred upon the legislature; that the right claimed by plaintiffs in error is a property right of which they may not be deprived without compensation; that if said chapter 259 of the Laws of 1913 be held applicable to these defendants, they will thereby be deprived of their property without due process of law and will be deprived of the equal protection of the laws, contrary to the provisions of the

Fourteenth Amendment to the Constitution of the United States, the protection of which these defendants invoke.

The nature of the State's title to navigable waters.

A question of the utmost importance to the people of the State of Kansas and one in which every inhabitant of the State is interested, is presented by the pleadings in this case, viz., the nature of the actual rights of the State in the beds of navigable streams, as against the inhabitants of the State including, of course, the common rights of the people of the State in such beds and the manner of their enjoyment of those rights, not including, however, the extent of mere police regulation. The question may be stated broadly: "Can the State sell the bed of a stream navigable in fact, such sale not being for any other purpose than the enrichment of its general treasury?"

An affirmative answer to this question carries with it such a train of consequences seriously in diminution, if not in destruction of rights and privileges which have, from time immemorial, been exercised by the people as of common right, of consequences so grave that the legislature would seem, if such claimed right be sustained, to be vested with unrestrained power to disregard natural laws; consequences that must be provocative of endless litigation and confusion in the laws governing property rights, that we feel that any tribunal to which the protection of the rights of the people is entrusted, must clearly, conclusively and undeniably perceive the existence of such a right before it will sustain a claim to its existence.

A river, to be technically navigable, that is, navigable at common law, must be subject to the ebb and flow of the tide. This doctrine is so well settled, so beyond controversy, that a citation of further authorities to sustain it would

be simply burdening this Court unnecessarily, especially since the decision of *Clark v. Allaman*, 71 Kas., 206, which so thoroughly covers the ground and applies the rule to this State. As so concisely put by Mr. Justice Burch in that case, l. c. 229:

“What is true of the system must be true of each rule which it embraces, and the common law rules in relation to riparian rights became the law of Kansas, *for every stream within its border.*”

Some of the States of the United States, conceiving the doctrines of the common law with reference to streams technically non-navigable, but navigable in fact, inapplicable to this country, have, by direct or judicial legislation, abrogated the rule which vested title to the beds of all fresh water streams, whether such might be navigable in fact, or not, in the adjoining land owner as one of his riparian rights, and apply the rule applicable in England to streams subject to the ebb and flow of the tide, to waters which may, in fact, be navigated.

It is contended that the case of *Wood v. Fowler*, 26 Kansas, 682, places Kansas in the latter class and a cursory examination of the case would seem to confirm that view. It is a fact that from the time of the organization of Missouri Territory, continuously to the fall of the year 1868, the common law, in its broadest, fullest sense, was the law of the vast tract of territory later admitted into the Union of States as the State of Kansas; *vide Clarke v. Allaman, supra*. What does the history, political, industrial or judicial, of the State, from 1868 to 1882, offer as a reason for, or as supporting the necessity of a change from these ancient rules, insofar as they are applicable to non-tidal waters? Nothing, *absolutely nothing*; but some observa-

tions of the great jurist who delivered the opinion of the Court in that case (*Wood v. Fowler, supra*), observations wholly unnecessary to the decision of the issue, are pounced upon and exhibited as authority that there had been such a change. We believe it to be true that all of such portion of Mr. Justice Brewer's opinion in the case referred to as touches upon ownership of the bed of the stream, was wholly unnecessary to the decision of the controversy.

The Statute of 1868 *did not in terms, or by necessary implication*, change the law as it had existed theretofore, nor was there such a necessary conflict between the statute of 1859 and that of 1868, as to work a repeal of the former. No rule was formulated or referred to by the later law, for the guidance of the courts in determining whereby or wherein "the wants and necessities of the people" required an abrogation of the rules which had been in existence for the guidance of the courts for so many years. It was not necessary that the title to the bed of the stream should be vested in the state in order to protect the interests of the people. That such was the view of that Court (at least until November 11th, 1911, when the opinion in *Dana v. Hurst*, 86 Kans., 947, was filed), *Clark v. Allaman* places beyond dispute. How far-reaching are the rules which protect the rights of the people, is evidenced by the decision of *U. S. v. Chandler-Dunbar Power Co.*, 229 U. S., 57. How far the case of *Dana v. Hurst* will be authority for this view that the common law rule theretofore existing has been replaced by a rule more modern is to be seen. It is, perhaps, unfortunate that *Dana* did not seek the aid of the Federal Supreme Court for a decision upon the point. Of course, it may not have been practicable to do so, owing to the state of the pleadings, but it would seem, if the foregoing view of the extent of the decision in *Wood v. Fowler*

is correct, and the law is as laid down in *Clark v. Allaman*, then the decision against Dana clearly deprived her of her rights by the establishment of a rule of law subversive of that which prevailed when she obtained title to her property.

Be that as it may, however, the only question decided by *Dana v. Hurst* is that the title to the bed of the meandered streams of the state is in the state. The question thereupon arises, suppose the title to the bed *is* in the state, what does such title carry with it? Does the fact imply that the state has a *proprietary* right in that bed, or is the title a *mere trust* the *use* being in the people in common, a use to be exercised in the manner admitted of by the nature of the *res*?

The dual nature with which, by law and of necessity, the monarchs of England were invested and the consequent diverse nature of the titles vested in them, some of their private right, some in their representative right, gives rise to much confusion in the decisions, and, at times, it is difficult indeed to distinguish in what capacity the King claimed in a given case. It seems to be beyond controversy that the monarchs of England themselves lost, to a great extent, their appreciation of their dual character and claimed as personal rights many, an increasing many, of the prerogatives pertaining to their official position. These encroachments were, to a certain extent, checked by the unsympathetic subjects who, by armed force, wrung the reluctant consent of their monarch to Magna Charta, in the year 1214 A. D. One of the encroachments so cut off was the claimed right of the monarch to proprietary rights in the navigable waters of the realm. Since Magna Charta, in the year 1214, the monarch has had no power to grant in proprietary right the navigable waters or the lands under them (*Martin v. Waddel, infra*). The title indeed, remained

in him for, pursuant to our notions of political economy, title must rest somewhere; and in the case of rights purely public, where a more natural repository than the King? Under these conditions, the *title could vest only in trust*, and such has been the view of the courts of this country as evidenced by their decisions at the time of the submission of the question to them, and ever since, to the present day, that view has remained unaltered.

In the year 1664, King Charles II granted to the Duke of York, his brother, certain territory, including what is now the State of New Jersey. This grant (for its wording see 16 Peters, l. c. 369 to 374, inc.), contained in the strongest terms words appropriate to the vesting in the grantee of rights private in their nature. By divers transfers, grants and charters, these rights, as to a part of the granted territory were vested in "The Proprietors" so called, who afterwards, in 1702, surrendered all such rights, except what was vested in them as personal rights and properties, to Queen Anne. At various times subsequent to such surrender, the proprietors made divers grants and conveyances of what they assumed to be properties which had vested in them personally, among such being a survey to Peter Summons, in 1689-90 and 1685, to the bed of navigable waters. This grant became the subject of litigation in 1821 when Arnold sued Mundy in trespass for breaking his close and taking his oysters, situated in and under the navigable waters referred to (*Arnold v. Mundy*, 6 N. J. Law Rep., 1). The issue on the part of the defendant is thus stated:

"The defendant pleaded 'not guilty' and gave notice that the *locus in quo* was a public navigable river, in which the tide flows and reflows, in which oysters grow naturally and that all the citizens of the State *had a common right to take oysters therein*," etc.

Id., 2.

Thus clearly challenging the possibility of existence of any private property in the bed of a navigable stream and as clearly voicing the rights of the people in common, referred to in the foregoing subdivision of this brief. It is true, that the oysters might be deemed personal estate, but not so as to a *natural deposit or bed*, and the action was in trespass for breaking plaintiff's close, which lay to try the rights of the plaintiff in the real estate (if it may be properly so designated), composing the bed of the stream. Chief Justice Kirkpatrick, in delivering the opinion of the Court, says:

“Then as to the right of the proprietors to convey and upon this I am of opinion that by the laws of nature, which is the only true foundation of all social rights, that by the civil law, which formerly governed almost all the civilized world, and which is still the foundation of the policy of almost every nation in Europe; that by the *common law of England, of which* our ancestors boasted and to which it were well if ourselves paid a more sacred regard, I say I am of the opinion that by all these, the *navigable rivers*, where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and *the land under the water* for the purposes of passing and repassing, navigation, fishing, fowling, sustenance and *all uses of the water and its products* (a few things which belong to the King in his *private right* and for his own use only, excepted), are *common to all the people, and that each has a right to use them according to his pleasure*, subject only to the laws which regulate that use; that the property indeed vests in the sovereign, but it vests in him *for the sake of order and protection*, and not for his own use, but for the use of the citizen. * * *

I am of opinion that this great *principle* of the *common law*, in process of time, was gradually encroached upon and broken down; that the powerful barons, in some instances, appropriated to themselves those common rights; that the kings also, in some in-

stances, during the same period, granted them out to their courtiers and favorites, and that these seizures and these royal favors are the ground of the several fisheries in England now claimed either by prescription or grant; that the great charter, as it is commonly called, which was nothing but a *restoration of common law rights*, though it did not annul what had been thus tortiously done, yet restored again the principles of the common people of their enjoyment of them."

(Id., page 12.)

And again:

"I am of opinion further, that upon the Revolution all these royal rights vested in the people of New Jersey, *as the sovereign of the country*, and are now in their hands * * * they may build dams, locks and bridges for the improvement of navigation and the ease of passage * * * but they cannot make a direct and absolute grant divesting all the citizens of their *common rights*. Such a grant or law authorizing such a grant, *would be contrary to the great principles of our Constitution*, and never would be borne by the people." (Id., page 13.)

In 1842, the precise question decided in *Mundy v. Arnold* came before the Supreme Court of the United States in *Martin et al. v. Waddell*, 16 Peters, 366 (U. S.), upon error to the United States Circuit Court for the District of New Jersey. The action was in ejectment for certain lands underlying the waters of Raritan River and Raritan Bay, the claim of the plaintiff being based upon the same grant to the Duke of York which formed the basis of the plaintiff's claim in *Arnold v. Mundy*. On account of the importance of the questions involved, the case was twice argued and exhaustive and illuminating briefs were filed. In the court below judgment went for the plaintiff in ejectment, but the judgment was reversed by the Supreme Court.

The defendant in error having cited authorities in opposition to plaintiff's claims, state, in his brief, the precise question here at issue, in the following language:

"Still it has been objected that the title of the defendant in error is not sustained by these authorities and the principles they establish, because, it is said, the power of the King to grant is confined to the alienation of private property, 'his ordinary revenue,' 'lands vested in him upon feudal principles,' and does not extend to the public property held 'by virtue of his prerogative,' in which way only, it is alleged, he holds the allodium of the soil of navigable rivers and of the sea." (page 401.)

The opinion was written by Chief Justice Taney, and he, having stated the question at issue, uses this language with reference to the grant to the Duke of York (p. 408-409):

"The right of the King to make this grant with all his prerogatives and powers of government, cannot at this day be questioned. But in order to enable us to determine the nature and extent of the interest which it conveyed to the Duke, it is proper to inquire into the *character of the rights claimed by the British Crown*, in the country discovered by its subjects on this continent, and the principles upon which it was parceled out and granted."

The country mentioned in the patents was held by the King in his public and regal character, as the representative of the nation and in trust for them. And again:

"We do not propose to meddle with the point which was very much discussed at bar, as to the power of the King, since Magna Charta, to grant to a subject a portion of the soil covered by the navigable waters of the Kingdom, so as to give him an immediate and exclusive right of fishery, either for shell fish or floating

fish within the limits of the grant. The question is not free from doubt and the authorities referred to in the English books cannot, perhaps, be altogether reconciled; but from the opinions expressed by the Justices of the Court of King's Bench, in the case of *Blundall v. Caterall*, 5 Barn & Ald., 287, 294, 304, 309, and in the case of the *Duke of Somerset v. Fogwell*, 5 Barn & Cress, 883 and 884, the question must be regarded as settled in England *against the right of the King, since Magna Charta, A. D. 1214*), to make such a grant," etc. (Page 410.)

"For when the Revolution took place, the people of each State became themselves sovereign and *in that character held the absolute right to all their navigable waters for their own common use, subject only to the rights since surrendered by the Constitution to the general government.*" (Page 410.)

And this opinion referred to *Arnold v. Mundy*, and approved it, while in effect holding that that case is not binding upon the Supreme Court of the United States as a decision or mere local law arising upon state statutes or Constitution.

Martin v. Waddell's lessee was decided by a divided court, Justices Thompson and Baldwin dissenting. The sweeping effect of this decision is thus referred to in the dissenting opinion:

"A majority of the court seems to have adopted the doctrine of *Arnold v. Mundy*, decided in the Supreme Court of New Jersey, in which it is held that navigable rivers, where the tide ebbs and flows, and ports, bays, and coasts of the sea, including both the waters and the lands under water are common to the people of New Jersey. * * * That no person who plants a bed of oysters in a navigable river has right as to enable him to maintain an action of trespass against anyone who encroaches upon it and this rests on the broad proposition that the title to the land under

the water did not and could not pass to the Duke of York as *private property*. To maintain this proposition it must rest on the ground that *the land under a navigable river is not the subject of a private right.*" (Page 419.)

And see *Smith v. Maryland*, 18 How., 74-75, citing authorities and holding soil in the Chesapeake Bay within the boundaries of Maryland *belongs to the State in trust for the public*.

Illinois Central R. R. Co. v. Illinois, 146 U. S., 456, holding tide lands held in trust for the people and cannot be alienated to their detriment; and

The decision in *Martin v. Waddell* was re-affirmed in *Den ex dem., Russell v. New Jersey Co.*, 15 How., 426.

In *Gaugh v. Bell*, 21 N. J. Law Rep., 156, the law is thus stated (Par. 2, Syllabus):

"The Crown could not grant a several fishery in navigable river or arms of the sea; and *a fortiori*, could not grant the soil under water, a grant which would involve the destruction of fishery."

In *Shiveley v. Bowlby*, 152 U. S., 1 (decided in 1893), the question was as to the title of lands below high water mark in the Columbia River. Mr. Justice Gray, upon the question at issue, states (l. c. 11):

"By the common law both the title and dominion of the sea where the tide ebbs and flows, and of all lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters and the lands which they cover * * * *are incapable of ordinary and private occupation*, cultivation and improvement; and their natural and primary uses are public in their nature, for the highways of commerce, domestic and foreign, and for the purpose of fishing by

all the King's subjects, therefore, the title, *jus privatum*, in such lands as of water and unoccupied lands, belongs to the King as the Sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit."

Third, fifth and sixth paragraphs of the syllabus in this case, read as follows:

"Upon the American Revolution, the title and dominion of the tide waters and the lands under them vested in the several states of the Union within their respective borders, subject to the rights surrendered by the Constitution of the United States."

"The new states admitted in to the Union since the adoption of the Constitution, have the same rights as the original states in the tide waters and in the lands under them, within their respective jurisdictions."

"The United States, upon acquiring a territory, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, take the dominion and title to waters *for the benefit of the whole people and in trust for the future states to be created out of the territory.*"

We have seen heretofore that the title by which the land under navigable rivers is held by the several original states and by the Crown of England is for the *common use of the public*. As this was the holding of the Supreme Court as to the title of the United States to territory acquired by it and held in trust for the benefit of the future states, such future states, it would seem, could not hold in a higher right, and therefore, *could not make a grant which might not be made by the United States*. To sell the sand in the bed of the river would be to grant a private right in trust property.

The questions under consideration again came up be-

fore the Supreme Court of the United States in *Morris v. U. S.*, 174 U. S., 196, which was an action in ejectment for reclaimed flats of the Potomac River, the claim of the appellant being summarized in the opinion by Mr. Justice Shiras (page 226):

“Briefly expressed, the appellant’s contention is that the property in the soil under the river Potomac passed to Lord Baltimore and his grantees and that it passed, not as one of the regalia of the Crown, or as a concomitant of government, but as an absolute proprietary interest, subject to every lawful public use, but not the less on that account a hereditament, and the subject of lawful ownership and of the right to full and unqualified possession when the public use shall have ceased.”

Answering the position so stated, the opinion proceeds:

“We need not enter into the discussion of this proposition, because the doctrine upon which it is based has been heretofore adversely decided by this Court in several leading and well considered cases (citing *Martin v. Waddell*, 16 Peters, *supra*.) The conclusions reached were that the various charters granted by the different monarchs of the Stuart Dynasty for large tracts of territory on the Atlantic Coast, conveyed to the grantees both the territory described and the powers of government including the property and dominion of lands under tide waters; that by these charters the dominion and property in the navigable waters and *the soils under them*, passed as a part of the prerogative rights annexed to the political powers conferred on the patentee, and in his hands were intended to be *a trust for the common use of the new community* about to be established, as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishing and *not as private property to be parceled out and sold for his own individual emoluments*. That upon the American Revolution all the rights of the Crown and Parliament vested in the several states,

subject to the rights surrendered to the national government by the Constitution of the United States; that when the Revolution took place, the people of each state became themselves sovereign, and in that character, held the absolute right to all their navigable waters and *soils under them, for their own common use*, subject only to the rights since surrendered by the Constitution to the Federal Government."

In a contest between the same parties, viz., *Morris v. U. S.*, the question arose as to whether the United States could vend a portion of the lands under water and convert the proceeds into the general treasury. The Court held that such could not be done, using the following language:

"The United States, holding the entire title to the waters of the Potomac and subjacent land by dedication in trust for the benefit of the nation, to be used solely for public purposes for the benefit of the seat of government, they could not be held vendible to private persons and thus available as a source of pecuniary advantage to the United States."

U. S. v. Morris, 23 Washington Law Reporter, 745.

That the dominion and ownership of such lands is in the sovereign for the benefit of the public, has long been settled. Such dominion and ownership of property generally implies the power of absolute disposition, but, with respect to land under navigable or tide waters, an important limitation has been engrafted upon this power, from the nature of the title. The title of the State to the sea coast and shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right; and it has been frequently said that a trust is engrafted upon this title for the benefit of the public, of which the State is powerless (Citing 3 Kent's

Comm., 9th Ed., 545; 3 Washburn Real Property, 4th Ed., 418; *Smith v. City of Rochester*, 92 N. Y., 463; *Gann v. Free Fishers*, 11 H. L. Cas., 192; *Ill. Cent. R. R. Co. v. Illinois*, 146 U. S., 387; *Hardin v. Jordan*, 140 U. S., 371; *Sanders v. R. R. Co.*, 144 N. Y., 75; 38 N. E. Rep., 992).

Coxe v. State, 144 N. Y., 406.

The title which the State holds and the power of disposition is an incident and part of its sovereignty that cannot be surrendered, alienated or delegated except for some public purpose or some reasonable use which can be fairly said to be for the public benefit. (Citing *Ill. Cent. R. R. Co. v. Illinois*, 146 U. S., 387; *Shively v. Bowlby*, *supra*; *People v. Squire*, 107 N. Y. 593, 14 N. E. Rep., 820; *Buffalo E. S. R. Co. v. Buffalo S. Ry. Co.*, 111 N. Y., 132-140, 19 N. E. Rep., 63).

Coxe v. State, *Supra*.

It was never supposed that it could grant away any of this portion of its domain for mere speculative purposes or that it could traffic in it like an individual who owned property which he had the right to sell at such price and for such purposes as his immediate wants and interests seemed to require.

Coxe v. State, *supra*.

That this doctrine of right of common to the sea shore being vested in the people is no new doctrine, see report of a proceeding instituted in 1631 (7 Chas., 1), by the Attorney General, for the seizure of a claimed purpresture, in which the information recites:

“The King is, or ought to be (sic), lawfully seized in his demesne as of fee in right of his Crown

of England, of and in a certain breach * * * and was part of the sea strand, *and common for all the King's people.*"

Exch. B. & A., Southton, Chas. 1, 42.

In Sir John Constable's case, which was an information in *quo warranto*, by the Attorney General, in the 17 Eliz., 1575 A. D., against Sir John Constable, charging intrusion by the defendant upon the Queen's rights, in the taking of wreck, etc. (reported in Anderson, p. 86), Plowden, in his argument, is credited with the statement:

"But though the Queen has jurisdiction in the sea adjoining her realm, *still she has not property in it nor in the land under the sea, for it is common for all* and she cannot prohibit anyone from fishing there."

In this argument, Plowden cites Bracton, Lib. 2, Cap. 2:

"If an island is born in the sea, which rarely happens, it belongs to the occupant, and with this Briton agrees, which proves that the Queen has not property in the sea nor in the land under it."

It appears that the first informations filed in English courts to enforce the alleged *prima facie* title of the Crown to the overflowed lands of the seashore, were filed by Digges, a grantee of Elizabeth in the 13th and 14th of Elizabeth (1570-71). And, says Moore, they were failures.

Lansdowne M. S., 105;

Exch. Q. R., Mem. T., 14 Eliz., 97;

And see Hale, *De Jure Maris*, Ch. 2.

It is not contended that the State may not regulate the common use, and make the exercise of the regulated common right to bear the expense of such regulation, but it is contended that the trust estate must lie and be held for the

purposes of the trust only, and not as a source of income to the State. It is admitted that the trust estate may be subjected to the cost of its own necessary improvement, but the burden so levied must bear equally upon all partakers of the common right. To hold otherwise, is to hold that a trustee may discriminate in favor of some of the common owners and against others, the logical effect of which discrimination must be the creation of a private right, *pro tanto* in the trust or common estate.

It will be noticed that throughout the decisions which bear upon the question here under consideration, the words "title" and "dominion" are so used as to imply a distinction in rights designated by or to which these terms apply; and there is a wide and important difference. If the terms have been judicially defined, we must keep in mind the accepted definition in determining the scope of the decision using them. In *Shively v. Bowlby*, 152 U. S., 1, the Supreme Court of the United States admirably defines the respective terms when used in connection with the subject-matter of this article. We quote:

"Therefore, the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation, and for the public benefit."

In *Hardin v. Jordan*, 140 U. S., 371, Mr. Justice Bradley, considering the question of title to the adjacent and sub-jacent lands of navigable waters, states:

"Such title to the shores and lands under water is regarded as incidental to the sovereignty of the State, a portion of the royalties belonging thereto and held *in trust* for the public purposes of navigation and fishery." (l. c., 382.)

"This soil is held by the State, not only subject to, but in some sense, *in trust*, for the enjoyment of certain public rights."

Per Mr. Justice Curtis, in *Smith v. Maryland*, 59 U. S., 18, 15 L. R. A., 269, 270.

"The policy of England since Magna Charta, for the last six hundred years, has been carefully preserved, to secure the common right of piscary *for the benefit of the public*. It would require plain language in the letters patent to the Duke of York to persuade the Court that the *public and common rights* of fishing in navigable waters, which has been so long and so carefully guarded in England and which was preserved in every other colony founded on the Atlantic borders, was intended in this one instance to be taken away."

Martin v. Waddell, supra (syllabus).

In summing up its conclusions in the exceedingly well considered case of *Shively v. Bowlby, supra*, the Court say (l. c. 57):

"Lands under tidewaters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement *by individuals*, when permitted is incidental or subordinate to the public use and right. Therefore, the title and control of them are vested in the sovereign *for the benefit of the whole people*."

"At common law, the title and the dominion in lands flowed by the tide was in the King, for the benefit of the nation. Upon the settlement of the colonies *like rights* passed to the grantees in the royal charters *in trust* for the communities to be established. Upon the American Revolution, these rights, charged with a *like trust*, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution to the United States."

In the case of *Stockton v. Baltimore & N. Y. Ry. Co.*, 32 Fed. Rep., p. 9, which case involved the nature of the ownership by the State of lands under navigable waters, the Court say:

"It is insisted that the property of the State in lands under its navigable waters is *private property*. * * * The character of the title or ownership by which the State holds the State House is quite different from that by which it holds land under the navigable waters in and around its territory. * * * After the conquest (the American Revolution), the said lands (tide lands), were held by the State, as they were by the King, *in trust for the public uses of navigation and fishery* and the erection thereon of wharves, piers, lighthouses, beacons and other facilities of navigation and commerce. Being the subject of this trust, they were *publici juris* in other words, *they were held for the use of the people at large.*"

In *Arnold v. Mundy*, *supra*, as approvingly quoted in *Martin v. Waddell*, *supra*, and in many subsequent cases, including *Ill. Cent. Ry. Co. v. Illinois*, *supra*, Judge Kirkpatrick, who delivered the opinion of the court, states:

"The sovereign power itself, therefore, cannot consistently with the law of nature and the constitution of well ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance *which never could be long borne by a free people.*"

In comment upon this passage, the United States Supreme Court use this very significant language (*I. C. Ry. Co. v. Ill.*, *supra*, p. 456):

"*Necessarily must the control of the waters of a state over all lands under them, pass when the lands are conveyed in fee to private parties and are subjected by them to use.*"

There are many instances in which the State has granted rights to private citizens in this part of the public domain, but examination of the cases invariably places the action of the State in one of three classes:

(1) Where the use which the subject of the grant is to be subjected is in furtherance of the public right and subject to public use;

(2) Where the use necessarily resulted in the improvement or preservation of the remainder of the public domain, and;

(3) Where the grant merely changed the form of the use, as where railroad traffic was substituted for possibility of navigation.

An illustration is furnished by the case of *Oakland v. Oakland Water Front Co.*, 118 Calif., 210, where it was held that the City of Oakland, holding the water front under a State grant, has no power to alienate the water front to a *private citizen*. The grant was to the city *in trust*. So, as we have seen, is the estate of the State, a trust estate.

Because of its very nature, there cannot exist a trust without a beneficiary, and therefore, some right or benefit to be enjoyed. To state that there may be a beneficiary without the right to enjoyment by him of the benefits would be to state an absurdity. As has been seen, the beneficiaries of the trust vested in the State are all of the people. Benefits may be enjoyed only according to their nature, in accordance with and limited by the possibilities of enjoyment.

The rights of the people, retained to the people and by the people, in and to the Kansas River are capable of enjoyment only in the common use by all of the people. And so of the sand in the waters of the river, each individual

securing his share by his individual industry. These rights, being rights in common, and *natural rights*, are and must be in the nature of things, perpetual. Wherefore, the State's title is perpetual and cannot be divested. The character of the benefit determines the use and the trustee whether he be king or common, will not be permitted to assert any private interest in the trust property contrary to, or to limit or circumscribe, such use. The right of regulation does not deny the existence of a trust estate, it simply emphasizes it and there is nothing difficult or extraordinary in the regulation of the exercise of a common right. It is done every day in the regulation of commerce, of navigation, and of fisheries.

"The King has the property, but the people have likewise the *use necessary*."

Callis on Sewers, 55, 74.

Many of the King's rights are, to a certain extent, for the benefit of his subject, and that is the case as to the sea, in which *all* his subjects have the rights of navigation and fishing. Per Bailey, J., in *Blundell v. Cotterell*, 5 Barn & Ald., 268.

We have seen by the admitted facts in this case, that the right to take sand from the Kansas River, and the other rivers of the State (and such throughout the world is universal custom), has ever been exercised by the people within and throughout the State. In *Ball v. Herbert*, 3 Term. R., 261, Lord Kenyon thus lays down the rule for recognition of common law rights:

"Common law rights are to be found either in the opinions of lawyers, delivered as axioms or to be collected from the universal and immemorial usage throughout the country."

"A general immemorial custom throughout its realm is the common law. Many of our most valuable common law rights have no other support than universal practice." Best, Judge, in *Blundell v. Cottrell*, *supra*.

"A custom which runs throughout the whole land is the common law."

Littleton Year Book, 8th Ed. 4-18-19.

Selden, in his "Mare Clausum," Book 1, Ch. 2, collects the thought of all nations on the subject of the public rights in the sea, which may be summed up "that the sea and its shores were common to all men, as much as the air that blows over them."

The entire situation in this case, arising under an Act of the legislature surprisingly similar to the Act here under consideration, was considered in *Rossmiller v. State*, reported in 58 L. R. A., 92, by the Supreme Court of Wisconsin. In that case the facts were that the State of Wisconsin had enacted a statute providing that the cutting of ice from any meandered lake of the State, for shipment out of the State, should be considered unlawful, unless such work was done pursuant to a license from the Secretary of State, which license should be granted upon the giving of bond assuring the compliance of the licensee with the requirements of the Act. The Act fixed a royalty of ten cents per ton and provided for fine and imprisonment or both, for non-compliance with its provisions. In the course of the opinion, which was delivered by Judge Marshall for the Court, it is said:

"It has been universally supposed, we venture to say, that the right of every person within the State to enjoy its public waters for every legitimate purpose, including cutting and appropriation of ice, which does not wrongfully interfere with the right of any other

person to like enjoyment, subject only to such *mere police regulations* as the legislature may, in its wisdom, prescribe, *to preserve the common heritage of all*, is a constitutional right of *all persons* within the State.

* * * Obviously the rule includes all people lawfully within the State, whether of the State in the sense of being residents thereof or otherwise. It has not been supposed that the State could deal with public waters, *or with any other thing held upon a like trust* to that of such waters, as the *proprietor* thereof.

* * * that any such thing could be treated in any respect as the absolute property of the State, *and used for purposes of revenue*. Obviously there can be no difference between public water in a liquid condition and in the form of ice, or between water *and the land covered thereby*, or the fish or fowls which inhabit the same, or any of the animals *ferae naturae*, in respect to sovereign authority over the same. If one may be dealt with, as the absolute property of the State, the others may be. It follows that if the legislation in question be valid, the right to take water from navigable lakes for shipment, though it in no way affect the character thereof for other public purposes, and the right to hunt and fish, may be subjects of *sale* by the State for the mere purpose of adding to the public revenues; those things which have been supposed to be public and for the *individual enjoyment of all, without restraint*, other than by reasonable police regulations to preserve their character in that regard, *things above sovereign authority to barter in*, as in ancient systems entirely foreign to ours, will cease to have that character in fact, and our notions with regard thereof will have to be readjusted to the newly established condition * * * that which regards the State, *not as a mere trustee for the whole people*, of the subjects we have mentioned, but as the absolute owner thereof, with power to deal therewith as a private person might if he were such owner."

It must be assumed, without discussion, that no property right was acquired by the State by the mere legislative declaration that the beds of the several rivers in Kansas were the property of the State. The legislature has no such arbitrary power, under our constitutional system as that of changing the nature of property by its mere *fiat*. It can no more accomplish that result in that way than it can change the laws of nature by a legislative declaration. The beds of the rivers of Kansas are the absolute property of the State in a proprietary sense or not at all. The declaration that such river beds belonged to the State, taken together with the acknowledged purpose of the Act, amounts merely to a proclamation that henceforth the State proposes to sell its proprietary interest in public waters and the subaqueous realty, or give it away, according to whether the property is to be sold or is to be utilized by the taker for his private purposes. We respectfully submit that the claimed power of the State is without authority in law or in fact; that the provisions and intent of said Chapter 259 constitute an obvious and tyrannical disregard of rights vested in the people for their common enjoyment, the control of which has never been surrendered to the legislature and the act is therefore void and of no force, but attempts to deprive the people of their vested public rights, which is beyond the power of any legislation.

As we have heretofore, in general terms, referred the court to *Clark v. Allaman* on the subject of common law rights of riparian owners in this State, so we now most respectfully refer the Court to the above cited case of *Rossmiller v. The State*, the opinion in which considers the entire subject so thoroughly and so ably as to leave a very narrow margin, if any, for further discussion.

Of the Right by Prescription.

Should it be held by the Court that, in fact, the title to the bed of the river is vested in the State in proprietary, with the absolute right of disposition, and that the sands which mixed with its waters, flow over its fixed bed, are in fact, of the real estate, and not of the character of wild things, then it must result, by the application of the common law rules, that a right in the realty may be obtained against that title by prescription. That prescription ran against the Crown in tide lands is beyond dispute.

Lord Hale, in a treatise on Admiralty Jurisdiction, as reported in Hargrave, N. S., 93, fo. 222, during a comment upon an inquisition dated October 13th, A. D., 1552, (6 Ed. VI), against the Abbots of Abbotsbury, says, "but yet, in a creek or fleet of the sea, a subject may, by custom or *prescription*, have a private interest or property exclusive of others."

Again, in Hale's first treatise, (*caput primum*) he states:

"I shall now descend to the examination how and in what manner and by what means a port may be legally created or constituted.

A port, as is before sayd, is a franchis or liberty, as a market or faire is and may be acquired by the same means, viz:

I. By prescription or usage immemoriall; and thus are most of the ports of England.

II. By the creation or institution of the Kinge for *portus* and *portatica* are among the regalia, not only in this kingdom, but generally in all kingdoms and states.

If a man hath a port by grant or prescription, it may bee considerable whither the Kinge cannot erect another porte neare it, to the damage of it," etc.

Under the head, "Concerninge the translation of the franchis of propriety of a port to a subject," *capitulum Quintim* II of the same work, the venerable author says:

"Touchinge the interest of propriety of the soyle of the land covered with salt water; this though *prima facie*, as is sayd before, belongs to the Kinge, yet is acquirable by a subject, not only by charter, whereof there can be no doubt, but by usage, custome, or prescription," etc. * * *

4. * * * Many lords that have mannors borderinge upon the haven within the port, have by longe and constant usage, had the shore there and disposal of sand and kilp," etc.

5. A subject that hath not the franchis of the port, yet hee may, by usage and prescription have the very soyle and channel of a navigable river, creeke, or channel wherein the sea flowes and reflowes, nay though it be constantly salt water at low water; and this shall be made out by divers evidences," etc.

A right of franchise for a ferry could arise by prescription.

Hale "De Jure Maris," Cap. II, Par. 1.

"The second right is that which is acquired or acquirable to a subject by custom or prescription, and I think it very clear that a subject may, by custom and usage, or prescription, have the true propriety and interest of many of these several maritime interests which we have before stated to be *prima facie* belonging to the King."

Id. Chap. V, Par. 2nd.

But even this title was subject to the right of navigation in the public. Id.

Among the evidences of such descriptive title, Hale gives "constant and usual fetching of gravel and sea weed and sea sand," etc., Chap. VI. Indeed the entire chapter

appears to have been written principally in relation to this subject. And see the very interesting statement of the case of *Attorney General ex rel. Sir Sackville Crowe*, commenced in 12 Car. 1, contained in this Chapter, at the trial of which case Hale states he was personally present.

The right claimed is sustained by the following authorities:

Saltash v. Goodman, L. R., 7 Q. B. Div., 106;

Orford v. Richardson, 4 T. R., 437;

Carter v. Murcat, 4 Burr, 2162;

Lord Advocate v. Lovat, L. R., 5 App. Cas., 288.

In the case last cited, it is held that a prescriptive right of piscary, when once established, extends to the whole river; and *Rogers v. Allen*, 1 Camp., p. 309, it is held that if the right is once acquired it may pass as appurtenant to the owners' estate.

The general principle is that no time runs against the King, yet by custom or prescription, a subject may acquire certain of the maritime interests of the Crown, including the right of fishery in the creeks and arms of the sea, *the property in the shore and in the land left by the recession of the sea*, etc.

Gould on Waters, 3rd Ed., pp. 48-49, Sec. 22;

Re. Belfast Dock, 1 Ir. Rep. Eq., 128;

Re. Alston's Estate, 5 W. R., 189;

Folsom v. Freeborn, 13 R. I., 200, 206.

Long continued enjoyment of the shore by taking shell fish and gravel, or by letting it to tenants to take seaweed,

suffices to prove that it is part of the adjacent manor. As to which see:

LeStrange v. Rowe, 4 F. & F., 1048;
Healey v. Thorne, Ir. Rep., 4 C. L., 495;
Neill v. Devonshire, 8 A. C., 153-70;
Little v. Wingfield, 8 Ir. C. L., 279;
Yard v. Ocean Beach Ass'n., 49 N. J. Eq., 306;
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Strange v. Spalding, 29 S. W., (Ky.), 137;
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 1 Bacon's Abridg., 640;
 Cook on Littleton, 107a, 260a;
 Gould on Waters, 3rd Ed., Sec. 22;
 Washburn on Real Property, 6th Ed., Vol. 11, p. 297.

Plaintiffs in error contend that the provisions of said Chapter 259, Laws of 1913, of the State of Kansas, are inapplicable to them and those similarly situated as to their titles to the banks and bed of the Kansas River; but should it be held that the provisions of said chapter are, in fact, applicable to them and to their titles, then it is submitted that as to them and each of them said statute is void and of no force, in that by its provisions it deprives them, and each of them, of their property and property rights without due process of law and plaintiffs in error are deprived of the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, and the property of each of them is taken for public use without compensation.

Respectfully submitted,
 FRANCIS C. DOWNEY,
 ARMWELL L. COOPER,
 DENIS J. DOWNEY,
Attorneys for Plaintiffs in Error.

APPENDIX

SENATE SUBSTITUTE FOR HOUSE BILL NO. 219.

BY JUDICIARY COMMITTEE.

AN ACT

Relating to the sale and taking of sand, oil, gas, gravel, mineral and any natural product whatsoever from the bed of any river which is the property of the state, or any island therein, and relating to the taking and selling of hay, timber, and other products of lands lying in the beds of such rivers; prescribing certain powers and duties of public officers in relation thereto; and prescribing penalties, and repealing inconsistent legislation.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That from and after the taking effect of this act it shall be unlawful for any person, partnership or corporation to take from within or beneath the bed of any navigable river or any other river which is the property of the state of Kansas any sand, oil, gas, gravel, or mineral, or any natural product whatsoever from any lands lying in the bed of any such river or any hay, timber or other products belonging to the state, except in accordance with this act.

SECTION 2. Whenever any person shall desire to take from any such river any sand, gravel, oil, gas or mineral, or from any land in such river any hay, timber or other products, he shall first obtain the consent of the executive council of the state of Kansas and upon such terms of payment to the state of Kansas and under such terms and conditions as the said executive council may determine to be just and proper. Such compensation to the state of

Kansas shall be paid at such times and under such terms of supervision as the said Executive Council may direct; provided, that no contract shall be entered into giving any person, company or corporation any exclusive privilege of making purchases under this act; and provided further, that nothing herein shall prevent the taking without payment therefor of any sand or gravel to be used exclusively for the improvement of public highways or to be used exclusively in the construction of public buildings or for other public use or to be used exclusively by the person taking same for his own domestic use; provided, however, that where any navigable stream extends into, or through, any drainage district in the state, organized under chapter 215 of the Session Laws of 1905, and the amendments thereto, the board of directors of such district shall be entitled to one-third of the proceeds of such natural products or minerals which the state may sell from within or beneath the portion of the channel of such streams lying within such district, and said one-third of the proceeds arising from any such sale shall be paid to the treasurer of such drainage district, and shall be expended only by such district for any of the purposes for which such district was created. The other two-thirds of such proceeds to be paid into the state treasury as in case of channels of rivers lying outside of such drainage district; provided further, that the Executive Council may make such rules and regulations as in its judgment may be deemed necessary for the collection of such proceeds, and the manner and conditions under which sand or other material may be taken from the stream within such drainage district.

SECTION 3. The Executive Council is hereby authorized to make and publish in the official state paper all needful rules, terms and conditions for the taking, purchasing or selling of the articles and products mentioned in this act, and to change the same as the rights of the state and the interests of the public may require, and to make any nec-

essary and reasonable expenses to carry the same into effect, which expenses shall be paid out of the gross proceeds of the sale of the materials covered by this act.

SECTION 4. It shall be the duty of the attorney-general, or any county attorney, on direction of the governor, to bring any suit necessary or proper to protect the property rights of the state under this act; and any district court of competent jurisdiction may enjoin any violation of this act, and may award to the state adequate civil damages for any breach thereof.

SECTION 5. The net proceeds derived from the sale of any state property under this act shall be paid to the state treasurer under such regulations as the Executive Council shall provide and shall inure to the general revenue fund of the state of Kansas, except as to moneys which are derived from the sale of property taken from school land islands, which latter funds shall inure to the benefit of the permanent school fund.

SECTION 6. For the purposes of this act the bed and channel of any river in this state or bordering on this state, to the middle of the main channel thereof, and all islands and sand bars lying therein, shall be considered to be the property of the state of Kansas, unless this state or the United States has granted or conveyed an adverse legal or equitable interests therein since January 29, 1861, A. D., or unless there still exists a legal adverse interest therein founded upon a valid grant prior thereto; provided, that nothing in this act shall affect or impair the rights of any riparian land owner or lawful settler upon any island which is state school land.

SECTION 7. The Executive Council is authorized and empowered to call to its assistance in the administration of this act all county or township officers, and it is hereby made the duty of every such officer to aid in the enforcement of this act.

SECTION 8. Any person or corporation violating any

provision of this act shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than twenty-five dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment; and for the purposes of prosecution it shall be *prima facie* proof that the river bed or island involved in such suit is the property of the state to show by the records of the county clerk and register of deeds that the same is not recorded as patented by the United States or by the state of Kansas, or recorded as school land sold but not yet patented by the state of Kansas, or otherwise held by record title.

SECTION 9. This act shall be liberally construed to promote its object, and if any competent court shall adjudge any provision thereof to be unconstitutional, such judgment shall not affect the other provisions of this act.

SECTION 10. Chapter 97 of the Session Laws of Kansas of 1864 and all other acts or parts of acts inconsistent with this act are hereby repealed.

SECTION 11. This act shall take effect and be in force from and after its publication in the Statute Book.

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JAMES D. MAHER,

CLERK.

No. [REDACTED]

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

NORMAN S. WEAR, Impleaded and now WEAR SAND COM-
PANY, and F. D. FOWLER, Plaintiffs in Error,

vs.

THE STATE OF KANSAS, ex rel. S. M. BEEWSTER, Attorney-
general, Defendant in Error.

In Error to the Supreme Court of the State of Kansas.

BRIEF FOR DEFENDANT IN ERROR.

S. M. BEEWSTER,

Attorney-general,

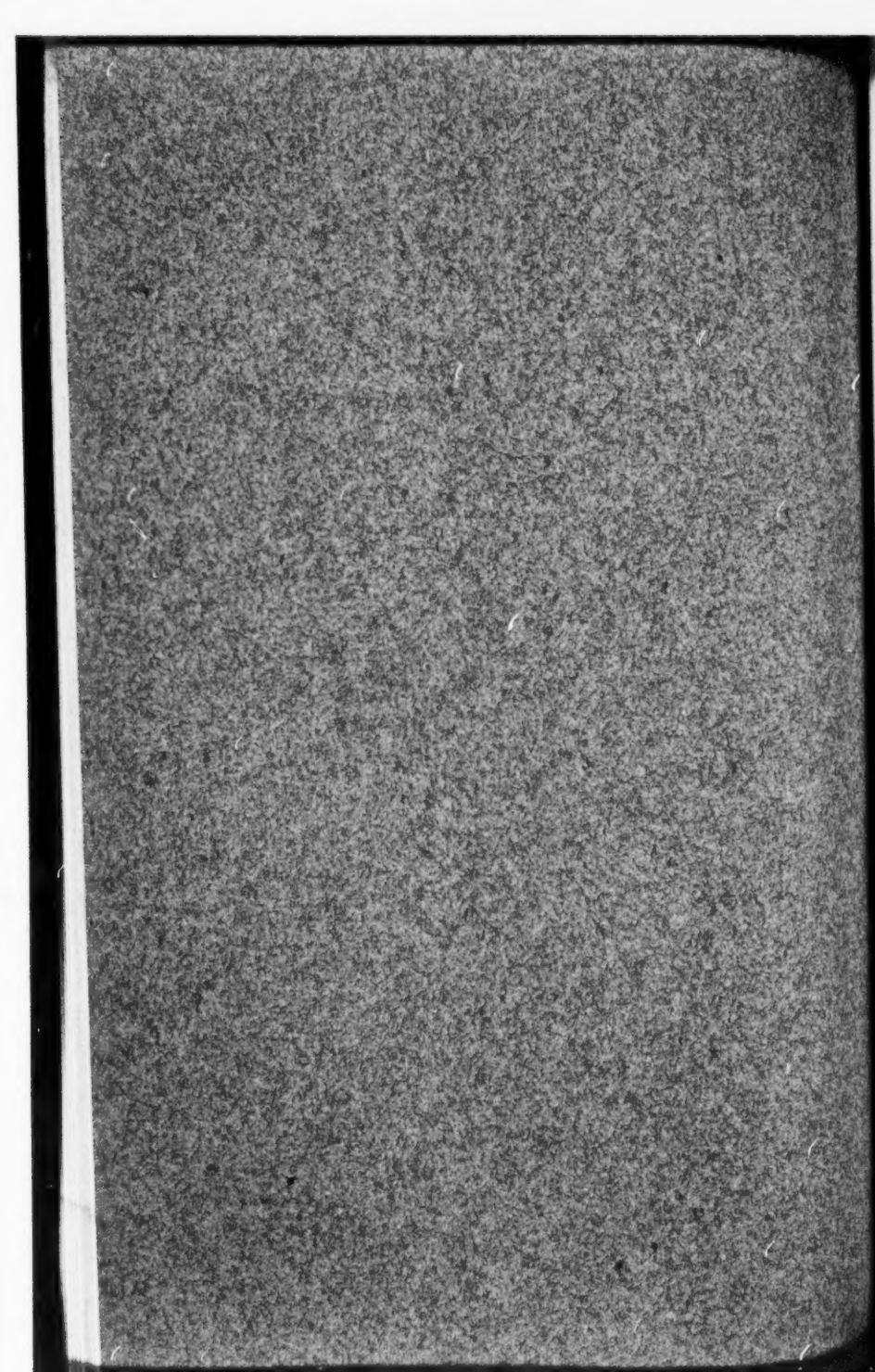
J. P. COLEMAN,

J. L. HUNT,

B. N. HAWKES,

Asst. Attorneys-general,

Attorneys for Defendant in Error.



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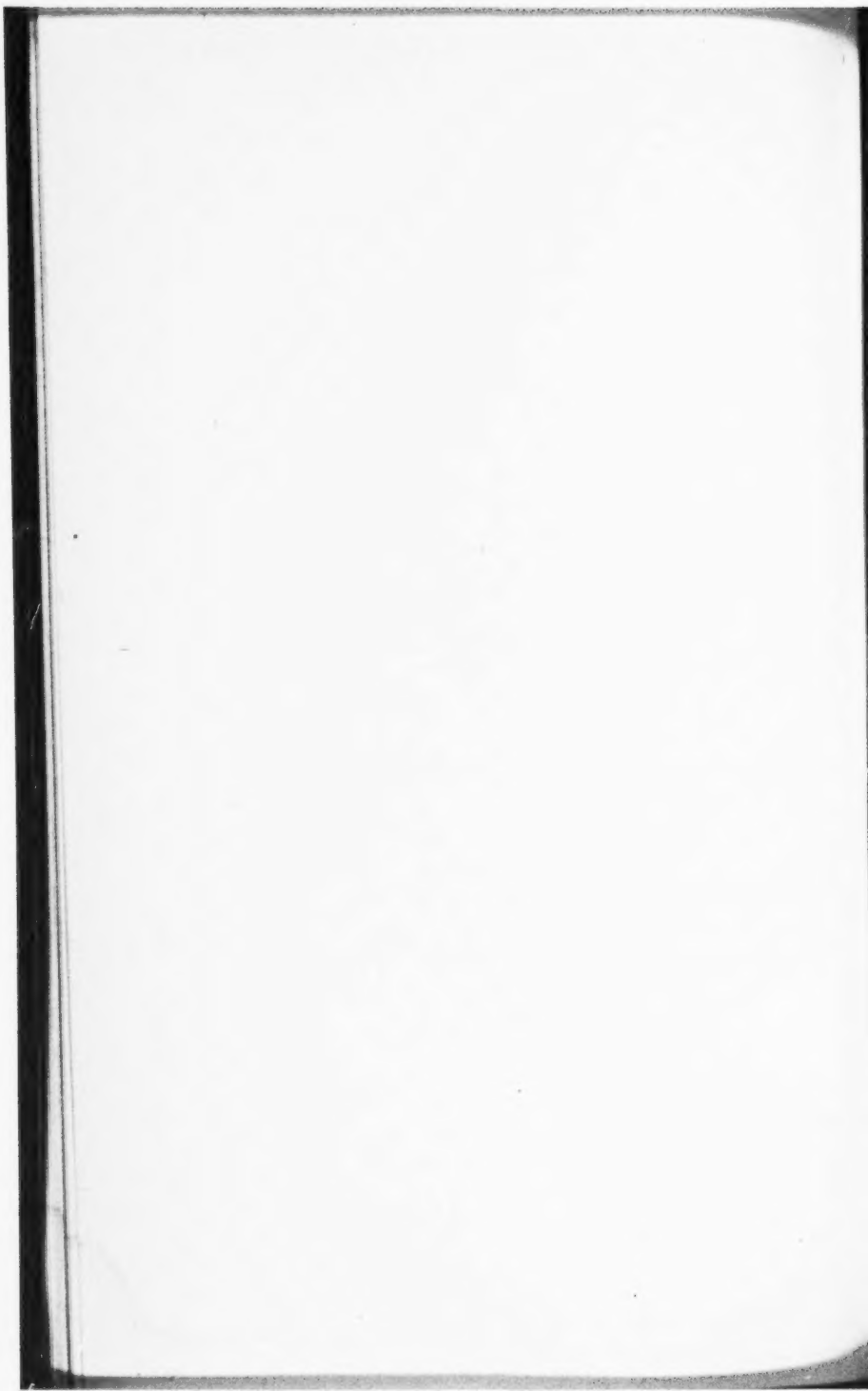
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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

NORMAN S. WEAR, Impleaded *sub nom* WEAR SAND COMPANY, and F. D. FOWLER, *Plaintiffs in Error*,

vs.

THE STATE OF KANSAS, *ex rel.* S. M. BREWSTER, Attorney-general, *Defendant in Error*.

No. 201.

In Error to the Supreme Court of the State of Kansas.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is an action in mandamus which was commenced as an original proceeding in the supreme court of Kansas and which arose under chapter 259, Session Laws of Kansas of 1913, which is as follows:

"AN ACT relating to the sale and taking of sand, oil, gas, gravel, mineral and any natural product whatsoever from the bed of any river which is the property of the state or any island therein, and relating to the taking and sale of hay, timber and other products of lands lying in the bends of such rivers; prescribing certain powers and duties of public officers in relation thereto; and prescribing penalties, and repealing inconsistent legislation.

"Be it enacted by the Legislature of the State of Kansas:

"SECTION 1. That from and after the taking effect of this act it shall be unlawful for any person, partnership or corporation to take from within or beneath the bed of any navigable river or any other river which is the property of the state of Kansas any sand, oil, gas, gravel or mineral, or any natural

product whatsoever from any lands lying in the bed of any such river or any hay, timber or other products belonging to the state, except in accordance with this act.

"SEC. 2. Whenever any person shall desire to take from any such river any sand, gravel, oil, gas or mineral, or from any land in such river any hay, timber or other products, he shall first obtain the consent of the Executive Council of the state of Kansas and upon such terms of payment to the state of Kansas and under such terms and conditions as the said Executive Council may determine to be just and proper. Such compensation to the state of Kansas shall be paid at such times and under such terms of supervision as the said Executive Council may direct; provided, that no contract shall be entered into giving any person, company or corporation any exclusive privilege of making purchases under this act; and provided further, that nothing herein shall prevent the taking without payment therefor of any sand or gravel to be used exclusively for the improvement of public highways or to be used exclusively in the construction of public buildings or for other public use or to be used exclusively by the person taking same for his own domestic use; provided, however, that where any navigable stream extends into or through any drainage district in the state, organized under chapter 215 of the Session Laws of 1905, and the amendments thereto, the board of directors of such district shall be entitled to one-third of the proceeds of such natural products or minerals which the state may sell from within or beneath a portion of the channel of such streams lying within such district, and said one-third of the proceeds arising from any such sale shall be paid to the treasurer of such drainage district and shall be expended only by such district for any of the purposes for which such district was created. The other two-thirds of such proceeds to be paid into the state treasury as in case of channels of rivers lying outside of such drainage district; provided further, that the Executive Council may make such rules and regulations as in its judgment may be deemed necessary for the collection of such proceeds and the manner and conditions under which sand or other material may be taken from the stream within such drainage district.

"SEC. 3. The Executive Council is hereby authorized to make and publish in the official state paper all needful rules terms and conditions for the taking, purchasing or selling of the articles and products mentioned in this act, and to change the same as the rights of the state and the interests of the public may require, and to make any necessary and reasonable expenses to carry the same into effect, which expenses shall be paid out of the gross proceeds of the sale of the materials covered by this act.

"SEC. 4. It shall be the duty of the attorney-general, or any county attorney on direction of the governor, to bring any suit necessary or proper to protect the property rights of the state under this act; and any district court of competent jurisdiction may enjoin any violation of this act, and may award to the state adequate civil damages for any breach thereof

"SEC. 5. The net proceeds derived from the sale of any state property under this act shall be paid to the state treasurer under such regulations as the Executive Council shall provide and shall inure to the general revenue fund of the state of Kansas, except as to moneys which are derived from the sale of property taken from school land islands, which latter funds shall inure to the benefit of the permanent school fund.

"SEC. 6. For the purposes of this act the bed and channel of any river in this state or bordering on this state to the middle of the main channel thereof and all islands and sand bars lying therein shall be considered to be the property of the state of Kansas unless this state or the United States has granted or conveyed an adverse legal or equitable interest therein since January 29, 1861, A. D., or unless there still exists a legal adverse interest therein founded upon a valid grant prior thereto; provided, that nothing in this act shall affect or impair the rights of any riparian land owner or lawful settler upon any island which is state school land.

"SEC. 7. The Executive Council is authorized and empowered to call to its assistance in the administration of this act all county and township officers, and it is hereby made the duty of every such officer to aid in the enforcement of this act.

"SEC. 8. Any person or corporation violating any provision of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than six months or by both such fine and imprisonment; and for purposes of prosecution it shall be *prima facie* proof that the river bed or island involved in such suit is the property of the state to show by the records of the county clerk and register of deeds that the same is not recorded as patented by the United States or by the state of Kansas or recorded as school land sold but not yet patented by the state of Kansas, or otherwise held by record title.

"SEC. 9. This act shall be liberally construed to promote its object and if any competent court shall adjudge any provision thereof to be unconstitutional such judgment shall not affect the other provisions of this act.

"SEC. 10. Chapter 97 of the Session Laws of Kansas of 1864 and all other acts or parts of acts inconsistent with this act are hereby repealed.

"SEC. 11. This act shall take effect and be in force from and after its publication in the statute book."

THE PLEADINGS.

Under the practice in Kansas obtaining in mandamus actions, the writ which takes the place of a petition or declaration and the return or answer are the only pleadings. (§ 7654, Gen. Stat. Kan. 1915.) This action was presented to the court below upon the writ (trans. 2), the returns or answers of the two plaintiffs in error (trans. 7, 18), and the motion of plaintiff below, defendant in error here, to quash the returns and for judgment on the pleadings (trans. 56).

THE WRIT. The material allegations of the writ, omitting formal allegations, are:

That as a sovereign commonwealth the state of Kansas has sovereignty, ownership, dominion and control over the rivers, streams and waters in the state and of the lands underlying such rivers, streams and waters except such rivers, streams and waters and the lands thereunder as have been granted, patented or conveyed by the United States or the state of Kansas (§ 3; trans. 2);

That in such rivers, streams and waters over which the state has sovereignty, ownership and control and in the lands, beds and channels thereunder are large quantities of sand and gravel (§ 4; trans. 3);

That under the law above set forth the Executive Council of the state of Kansas fixed the price at which sand could be taken from the beds of "such rivers, streams and waters" at 10 per cent of the market value thereof to be remitted to the state treasurer monthly (§ 5; trans. 3);

That when the first payments became due under the law and the order of the Executive Council in June, 1913, there was paid under protest by the Wear Sand Company and F. D. Fowler, plaintiffs in error herein, \$193.83 and \$49.91, respectively, and that in July, 1913, there was paid under protest by F. D. Fowler, \$30.69, all for sand taken from "the rivers, streams and waters and the lands, beds and channels underlying the same belonging to the plaintiff" (§ 6; trans. 4);

That by reason of such protests the Executive Council directed the state treasurer and state auditor to keep said funds in a separate account; that it was their duty to transfer and deposit the same in the general revenue fund of the state;

and that they were still kept in such separate account and were not deposited in the general revenue fund (§ 7; trans. 4);

That the state depended upon the revenue derived from the sale of sand for its governmental expenditures and that it had no adequate remedy at law (§ 8; trans. 5);

That plaintiffs in error claimed an interest in the money so paid by them, and contended that on account of their protests the money should not be transferred to the general revenue fund of the state (§ 9; trans. 5).

The command of the writ is that the state treasurer transfer to the general revenue fund all moneys held as custodian of the river fund and that the auditor charge the treasurer with the funds as a part of the general revenue fund, or that they show cause, etc.; and that plaintiffs in error may likewise answer and show legal reasons why the moneys paid under protest should not be transferred to the general revenue fund. (Trans. 6.)

THE ANSWER of plaintiff in error, Norman S. Wear (filed in the name of the Wear Sand Company), admits the payment under protest of the money alleged in the writ and claims an interest in that money; asks proof as to the manner in which that money was handled and admits that he claims said money for the reason that he and not the state is entitled thereto. (Trans. 7.)

Denies all allegations of the writ not admitted. (§ 1; trans. 8.)

Alleges that in February, 1859, the territorial legislature of the territory of Kansas passed the following act:

"The common law of England and all statutes and acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the constitution of the United States and the act entitled 'An act to organize the territory of Nebraska and Kansas,' or any statute law which may from time to time be made or passed by this or any subsequent legislative assembly of the territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding";

That in October, 1860, and while said statute was in force, lot 5, sec. 30, tsp. 11, R. 16, which lot adjoined and was bounded by the Kansas river, was patented to one George Gardner,

under whom said plaintiff in error Wear claims as to part of said lot through mesne conveyances;

That said statutes remained in force after the admission of Kansas as a state in 1861 and until 1868, when it was superseded by the present statute, which appears as section 9850, General Statutes of Kansas, 1909, or section 11829, General Statutes, 1915;

That the common law of England governing the title to lands adjoining nontidal streams and the title to the beds of such streams became a rule of property of the state, and that by such common law the title to the beds of such streams is in the owners of adjoining uplands;

That said Wear is the owner of that portion of the bed of said Kansas river which adjoins the part of lot 5 which is owned by him, and has held possession thereof openly and notoriously for many years, and that since the passage of the said act of 1913 he has dredged sand only from that part of the bed of said river; that he has at all times denied the ownership by the state thereof; that the state threatened that unless he made the payments demanded and complied with said act of 1913, and the rules and regulations adopted thereunder, the state would enjoin him from pursuing his said business of dredging sand; that since the state was the opposing claimant and he was therefore deprived of access to the courts, and because of the threatened injunction which would cause irreparable injury to his business, he made the said payments under protest;

That said act of 1913 is inapplicable to him, and if enforced against him will deprive him of property without due process of law and of the equal protection of the law, contrary to the provisions of the constitution of the state of Kansas and of the United States (§ 2; trans. 8-11).

It is further alleged that the Executive Council, when duly convened and acting within its authority, is a ministerial body whose action is binding upon the state and its citizens; that a part of its duties is the charge, care and management of the property of the state, and that the only provisions made by statute for the care, custody, protection and control of the navigable waters of the state and the beds and banks thereof are the act of 1913;

That the Kansas river at the time of the making of surveys by the United States within the state of Kansas was

meandered on both sides for the full distance of said river covered by the operations of plaintiff in error; that said river lies wholly within the state of Kansas and flows directly into the Missouri river, which river from the north line of the state of Kansas to its mouth is a navigable stream; that the Missouri river flows directly into the Mississippi river, which river, both above the point of junction and below to its mouths, is a navigable stream; that the Mississippi river flows directly into the Gulf of Mexico, and—

“That said Mississippi and Missouri rivers, together with the said Kansas or Kaw river, to the up-stream extremity of the said meander lines, *now form and at all times hereinafter mentioned have formed one continuous open and unobstructed public waterway* of the United States between and from said up-stream extremity of the meandered lines of said Kansas river to and with the navigable waters of the high seas at and through said the Gulf of Mexico;”

That by chapter 97, Session Laws of Kansas of 1864, the Kansas river was declared to be a nonnavigable stream, and that said act had not been repealed until the year 1913;

That superimposed upon and flowing over and upon the bed of and moving with the waters in and of the Kansas river is a mass of sand and gravel which is not and never has been the bed of the stream nor the product of the disintegration of any *stratum* or *strata* of the bed or banks of the Kansas river, or any land adjoining it, from the mouth thereof to the head of the meandered lines of said stream, but that the same are the product of and flow into the stream from its tributary streams in the banks or beds of which tributary streams the state of Kansas has not and never has had any property right; that such sand and gravel are not and never have been fixed or immovable and never have formed any fixed *stratum*, but are shifting, unfixed, migratory, illusive and fugitive in their nature;

That such sand in its natural condition is not of commercial value, and—

“That the presence of such sand in the bed of said stream and mingled with its waters is in fact detrimental to the utilization of said stream for the great purposes for which, but for the presence of said sand the said stream could and would be utilized in the service of the people and the upbuilding of the commerce of the state of Kansas, to wit, *for the purposes of navi-*

gation and as a valuable commercial highway; that in fact said sand and gravel located upon and in and flowing over the bed of said stream, in the unlimited quantity in which it exists, constitutes a common nuisance by its accumulations, destroying navigation, filling up the watercourse, impeding passage of the water, and in time of high flood causing flood waters to overflow the river bank";

That such sand and gravel can be turned into an article of utility and commerce, and from time immemorial the people of the territory now comprising the state of Kansas have unquestioned and by common right taken and exercised the right to take sand and gravel—

"From the public waters and from the meandered streams within said territory including the said Kansas river; that such right has never been questioned in the state of Kansas until the present time, and is common to every community of people, civilized or otherwise, and is universally allowed, admitted and unrestrained; that *said Kansas river ever has been and now is claimed and admitted to be a public stream and public highway*, the right to the use of which stream, its waters and products, including the sand and gravel therein, and to take sand and gravel therefrom without let or hindrance, is and always has been vested in the people within said state and by common right allowed to be so vested, subject only to such reasonable rules governing the exercise of such right and for the protection of the common right as the state might, in the exercise of its police supervision, lawfully adopt, and to the right and control, *for the purposes of navigation*, vested in the United States by the constitution and laws of the United States";

That by virtue of the provisions of section 3, chapter 119, General Statutes of Kansas of 1868, the common law in England which theretofore had been the law of the territory of Kansas and of the state of Kansas, was continued in force in said state as modified of the conditions and wants of the people of the state; that at no time since or prior to the admission of the state into the Union had the provisions of said common law governing the rights of the individual citizens in the public waters and navigable streams of the state been modified either by law or by the wants and conditions of the people or by judicial decisions; that under such common law the use of the public waters and streams and the products thereof and the sand and gravel therein was a common right vested in the people, and that *the title to such waters and*

streams and the product thereof and said sand and gravel, when not otherwise vested, was vested in the state in trust for the common benefit of all the people; that such title was not an estate in fee, but a trust estate, and that each individual person within the state is entitled to reduce to possession and ownership a fair share of the sand and gravel therein, which right is a property right of which the plaintiff in error could not be deprived, except for public purposes and upon compensation;

That the sole claim of right made by the Executive Council is based upon said act of 1913, and that under pretense of power conferred by said act, and for the purpose of obtaining money from plaintiff in error, said Council procured the attorney-general of the state to institute an action against one of the original defendants below, The Stewart-Peck Sand Company, in the district court of Wyandotte county, Kansas, for the purpose of enjoining said The Stewart-Peck Sand Company, from exercising its undoubted right to dredge sand from said river unless said Stewart-Peck Sand Company should pay to the state treasurer the sums of money due under the rules and regulations passed by the Executive Council; that such suit was commenced and is now pending, and that the attorney-general threatened to commence and prosecute a similar suit against the said Wear and to prosecute his employees criminally;

That in order to avoid an irreparable injury which would result to its business from the suspension of its operations, and in order to protect its property and property rights from confiscation, and in order to protect its employees from arrest, said plaintiff in error under protest did pay the money specified in the writ herein; that such payments were not voluntarily made, but made wholly to protect said property rights;

That said act of 1913 constitutes no authority to the Executive Council to require compliance on the part of the plaintiff in error, for that if the provisions be held to apply to plaintiff in error he would be deprived of property and property rights without due process of law, and his property would be taken for public purposes without compensation, and he would be deprived of equal protection of the laws, contrary to the provisions of the constitution of the United States and of the state of Kansas. (§ 3; trans. 11-15.)

There are further allegations regarding the suit brought against the Stewart-Peck Sand Company in the district court of Wyandotte county, Kansas, and it is alleged that said action is still pending and that the determination and issues of said action would determine the right of the state to the so-called river fund, and that this proceeding is a proceeding of an extraordinary nature and not designed for the trial and disposition of matters affecting the right of property between contending claimants; that defendant has a right under the constitution of the state of Kansas to a hearing before a competent tribunal in the due and ordinary course of law, and that the supreme court of the state of Kansas is without jurisdiction to entertain and determine questions of right and property, but that for the court to do so would be to deprive plaintiff in error of the equal protection of the laws, contrary to the provisions of the constitutions of the United States and of the state of Kansas. (Trans. 15-16.)

The fifth and sixth counts of the answer of the Stewart-Peck Sand Company are adopted by said plaintiff in error, but because of amendments to the answer of the Stewart-Peck Sand Company, the numbering of the paragraphs have changed, and this undoubtedly refers to the sixth and seventh paragraphs, in which defects in the title and in the passage of the law are claimed.

It is further alleged that if said funds be paid into said treasury, and into the general revenue fund, plaintiff in error will be without remedy in the courts to compel restitution, if the claims of plaintiff in error should be sustained upon hearing in a court of competent jurisdiction. That the state has no clear and undoubted legal right to the relief sought, and that the state will not be entitled to said moneys until the conflicting rights of plaintiff and defendant shall have been defined in due course of orderly procedure by a court of competent jurisdiction. (§ 5; trans. 17.)

THE RETURN OR ANSWER of plaintiff in error F. B. Fowler is substantially the same as that of plaintiff in error Norman S. Wear, and raises substantially the same issues.

ARGUMENT.

Preliminary Questions.

It is suggested in the first part of the printed argument for plaintiff in error that the title to real property is in issue under the pleadings, and that upon this issue plaintiff in error was entitled to a jury trial under the constitution of Kansas. One answer, and a conclusive answer, to this suggestion is that the question raised is not a federal question and is not saved by the assignments of error. (Trans. 120.) Another answer is that no issue of fact which could have been submitted to a jury was decided by the court. The case was decided entirely upon issues of law raised by the pleadings.

Apart from these considerations, however, there is no merit in the suggestion. When the state demanded of plaintiffs in error royalties under the act of 1913, plaintiffs in error, if their contentions here are sound, could have either enjoined the state officers from enforcing the law as against them, on the ground that as against them the law was unconstitutional or they could have refused payment and asserted their rights in any action which the state might bring. They elected not to pursue either of these courses, but paid the money to the state officers under protest. When this was done, the money became subject to the assertion by the state of its right to this money as in the case of other moneys in the hands of public officers. As between the state and its officers, mandamus was, as is admitted by plaintiffs in error, the proper remedy. Plaintiffs in error were, under the Kansas practice and under the practice generally, proper parties. In *State v. Dolley*, 82 Kan. 533, 535, the court said:

"The practice in mandamus is well settled to make persons defendants of whom the performance of no duty is asked, but who have an interest in the subject matter. (26 Cyc. 415.)

"Technically, in mandamus the only necessary parties are the plaintiff, who asserts the right to have an act done, and the defendant, upon whom the public duty rests to perform it. The practice is common and commendable to bring in other persons who are likely to be injuriously affected by the judgment, in order that they may have an opportunity to be heard in their own behalf, and in a proper case the court will suspend proceedings until this is done. (*Livingston v. McCarthy*, 41 Kan. 20.)' (*The State v. Railway Co.*, 81 Kan. 430, 435.)"

Again, it is said by counsel for plaintiffs in error, in their brief, that because the act of 1913 does not attempt to cover the beds of rivers in which "this state or the United States has granted or conveyed an adverse legal or equitable interest," the power of the United States to make such a conveyance is recognized by the legislature. This, however, is not the effect of the act. It will be noted that the act nowhere refers expressly to *navigable* rivers. The framers of the law seem carefully to have avoided this expression. Their effort was to make the law cover all beds of rivers which belonged to the state without using that term. Accordingly, section 1 of the act makes it unlawful to take sand or other material from the bed of any river "which is the property of the state of Kansas," except in accordance with the act. Subsequent sections of the act refer to "such rivers"; that is, rivers which are the property of the state. Section 6 then provides that for the purposes of the act the beds and channels of rivers in the state shall be considered the property of the state—

"Unless this state or the United States has granted or conveyed an adverse, legal or equitable interest therein since January 29th, 1861, A. D. [the date of the admission of Kansas as a state], or unless there still exists a legal, adverse interest therein founded upon a valid grant prior thereto."

Practically all government land had been patented by the government and all school land by the state when this act was passed. These grants, of course, carried with them the beds of all nonnavigable waters contiguous to the lands conveyed. The act, therefore, covers the beds of navigable waters and of such nonnavigable waters as may be owned by the state as an incident to its ownership of unsold school lands or lands held in a proprietary capacity. The act does not therefore recognize that the United States had power to convey the beds of navigable rivers either before or after the admission of the state into the Union.

The Kansas River is a Navigable River.

In their answers herein plaintiffs in error admit that the Kansas river is navigable. It is admitted in the answers that the river, when the United States survey was made, was measured from its mouth to a point above where plaintiffs in error were operating, and that the Mississippi river, the Missouri

and the Kansas river, so far as the Kansas river is meandered, "now form and at all times hereinafter mentioned have formed one continuous open and unobstructed public waterway of the United States between and from said up-stream extremity of the meander lines of said Kansas river to and with the navigable waters of the high seas at and through the Gulf of Mexico" (trans. 11, 12); and "that said Kansas river ever has been and now is claimed and admitted to be a public stream and public highway, . . . subject only . . . to the right and control, for the purposes of navigation vested in the United States by the constitution and laws of the United States." (Trans. 13.)

In *Wood v. Fowler*, 26 Kan. 682, decided in 1882, Mr. Justice BREWER, speaking for the court, said:

"To attempt to prove that the Mississippi or the Missouri is a navigable stream would seem an insult to the intelligence of the court. The presumption of general knowledge weakens as we pass to smaller and less-known streams; and yet, within the limits of any state the navigability of its largest rivers ought to be generally known, and the courts may properly assume it to be a matter of general knowledge, and take judicial notice thereof; and in taking judicial notice, we know that the Kansas is the largest river wholly within the limits of the state; that it has been recognized as the prominent geographical feature dividing the state into northern and southern Kansas; that in early territorial history it was in fact navigated, a few steamboats going up and down its waters; and that its volume of water is such that in its natural condition it is capable of being used for purposes of navigation, and so coming within the recognized definition in this country of a navigable stream. (*The Montello*, 20 Wall. 430; *Booming Co. v. Speechly*, 31 Mich. 336.) We know that the lines of the United States surveys do not cross the channel, but that the stream was meandered. (Lester's Land Laws, p. 714.) We find among the territorial statutes (Laws 1857, pp. 166-167) two charters of navigation companies incorporated to engage in the business of navigating the Kansas. It is true in 1864 (Laws 1864, p. 180), an act was passed by the state legislature declaring the Kansas and certain other rivers not navigable; but the plain implication of the act is that the streams had theretofore been considered navigable, and its purpose was to sanction the bridging and damming of such streams. It certainly was not the purpose, and the act had not the effect, to enlarge the title of the riparian owners, or to recognize them as possessed of higher rights than heretofore. Indeed, where title is once vested, a mere change in the condition or character of the cur-

rent or the uses to which the stream is put will not transfer any title. (*People v. Tibbets*, 19 N. Y. 527; *Wheeler v. Spinola*, 54 N. Y. 377.) It was an assertion of state control over a stream wholly within its territorial limits—a control which, notwithstanding the general supremacy of the federal government over navigable streams, was asserted to exist in the state in the case of *Naederhauser v. The State*, 28 Ind. *supra*, as well as in many other authorities. So that for all the purposes of this case, and any question in it, we may assume that the Kansas is, at the point in controversy, a navigable stream. The stream having been meandered, the lines of the surveys are bounded by the bank; the patents from the United States passed title only to the bank."

In *Johnston v. Bowersock*, 62 Kan. 148, decided in 1900, the question was as to the effect of the statute of frauds on an oral contract to convey water power. There the court said:

"The claim that the water conveyed was an estate or interest in lands, and hence must be conveyed by deed, is without merit. In *Wood v. Fowler*, 26 Kan. 682, it was decided that title to the soil over which the Kansas river flows is not vested in the riparian owner, and that the stream is a highway and its waters public. It was there held that the title to ice formed on the surface of that river did not belong to a riparian proprietor, and that he would have no more ownership in it than he would have to the fish which swam in the stream. The water in the river not being a part of Bowersock's real estate, his necessary right to a part of the same, accumulated by the dam built by him, was in a sense a reducing of personal property to possession, much like the collection of a crop of ice; and the transfer of the water or ice so accumulated is not required to be by deed. The authorities cited to sustain the contention of defendant in error relate to streams not navigable, flowing through and over lands where the title to the soil under the water is in the riparian owner and where the public have no rights. In *Wood v. Fowler*, *supra*, the learned justice delivering opinion said:

"The title to the soil being in the state, and the stream being a public highway, obviously the ownership of the ice would rest in the general public, or in the state as the representative of that public. The riparian proprietor would have no more title to the ice than he would to the fish. It simply is this, that his land joins the land of the state. The fact that it so joins gives no title to that land, or to anything formed or grown upon it, any more than it does to anything formed, or grown, or found upon the land of any individual neighbor.' (See, also, *Washington Ice Co. v. Shortall*, 101 Ill. 46, and note, 21 Am. Law Reg. (n. s.) 313; Ang. Water., 5th ed., § 94.)"

In *Topeka Water Co. v. City*, 43 Kan. 404, decided in 1890, the court, in considering the rights of a water company which took its water from the Kansas river at Topeka, where plaintiffs in error operate, said:

"It also obtains its water from a navigable stream whose waters it does not own and can not own until it separates them from the stream."

In its opinion in this case the court said:

"The Kansas and the Arkansas rivers when the territorial act of 1855 was passed were navigable in fact." (Trans. p. 74.)

In *Kaw Valley Dist. v. M. P. Ry.*, 99 Kan. 188, decided in 1916, the first paragraph of the syllabus by the court is:

"The Kansas river is and always has been a navigable stream in contemplation of federal law."

In its opinion in that case the court said (p. 202):

"The Kansas river spanned by this bridge is a navigable stream in contemplation of federal law. (2 U. S. Stat. at Large, p. 666, ch. 36, § 12; p. 747, ch. 95, § 15.) Its status under state law needs some special discussion which will follow. . . .

"Under Kansas law and Kansas history the status of the Kaw as a navigable stream may be briefly stated. In territorial days, before the Civil War and the coming of railroads, the river was navigable and navigated. (*Wood v. Fowler*, 26 Kan. 682, 688.) A considerable commerce was developed extending from its mouth as far west as Fort Riley and Junction City, and occasionally further west. (Vol. 9, Kansas Historical Collections, 1905-1906, p. 317.) During the Civil War this commerce greatly declined, and for many years it continued to be inconsequential, although more recently it has somewhat increased."

In *Kaw Valley Dist. v. K. C. S. Ry.*, 87 Kan. 272, 275, the court said:

"The allegation in the answer that the plaintiff has no power or authority to require the bridge to be raised as demanded is possibly based upon the act of March 3, 1899, which provides (30 U. S. Stat. at Large, ch. 425, § 9, p. 1151) that it shall not be lawful to construct any bridge over any navigable water of the United States until the consent of Congress shall have been obtained and until the plans shall have been submitted to and approved by the chief engineer and Secretary of War."

The bridge involved in that case was a bridge over the Kansas river. On writ of error to this court the second paragraph of the syllabus is (*K. C. S. Ry. v. Kaw Valley Dist.* 233 U. S. 75) :

"The removal of the existing railway bridges over a *navigable* stream which form necessary parts of lines of interstate commerce can not be ordered by a state court. . . ."

In its opinion the court said:

"The supreme court recognized that it could not order the bridges to be raised to the required height without the authority of the Secretary of War,"

thus recognizing the navigability of the stream.

The Kansas legislature has recognized the navigability of the Kansas river in many ways.

Section 4 of chapter 30, Private Laws of 1858, an act to incorporate the Wyandotte Bridge Company, is as follows:

"SECTION 4. The said company is hereby authorized and granted the right to construct, build and maintain a bridge, across the Kansas river at a point not less than two nor more than six miles from the mouth of the same; provided, that said bridge shall be so constructed as not to interfere with the free navigation of said river.

Section 4 of chapter 31 of the Private Laws of 1858, incorporating the Wyandotte City Bridge Company, is as follows:

"SECTION 4. The said company is hereby authorized and granted the right to construct, build and maintain a bridge across the Kansas river at a point within one mile of the mouth thereof; provided, that said bridge shall be constructed so as not to interfere with the free navigation of said river."

Section 3 of chapter 34, Private Laws of 1858, an act incorporating the Lawrence Bridge Company and authorizing the building of a bridge over the Kansas river at Lawrence, Kan., provided:

"The said bridge shall be so constructed as not to prevent the navigation of said river by steamboats."

By section 4, chapter 66, Private Laws of 1863, incorporating the Kansas Central Railroad Company, it is provided:

"That where said road is constructed across navigable streams bridges shall be constructed of a sufficient height or with draws, and in no case shall the free navigation of the river be obstructed."

By section 3 of chapter 20 of the Private Laws of 1860, Special Session, an act to incorporate the Quindaro and Shawnee Bridge and Rock Company, said company was authorized to construct a bridge across the Kansas river at Kansas City, on the condition that said bridge should not obstruct the free navigation of said river.

The territorial legislature in 1857 (see Laws 1857, pp. 166, 167) incorporated two companies to engage in the business of navigating the Kansas river. The second section of these acts is as follows:

"SECTION 2. The object of this charter is for the purpose of employing one or more steamboats to navigate the Kansas river and its tributaries, for the conveyance of passengers, towing boats, vessels and rafts, and the transportation of merchandise or other articles."

Congress has also recognized its navigability as follows:

Chapter 348, Statutes of the United States, First Session, Forty-ninth Congress, enacted May 17, 1886, authorizing the Inter-State Rapid Transit Railway Company to construct a bridge over the Kansas river at Kansas City, Kan.

Chapter 15, Statutes of Second Session, Fifty-third Congress, enacted January 22, 1894, authorizing the construction and maintenance of a dam in Kansas river at Topeka, Kan.

By chapter 546 of act of July 1, 1898, making an appropriation for sundry civil expenses, \$20,000 was appropriated for "widening and cleaning out the mouth of the Kaw river where it empties into the Missouri river at Kansas City. (See Statutes of the U. S., 2d Session, 55th Congress.)

By the following acts Congress has made appropriation for surveys, examinations and estimates to ascertain whether or not the Kansas river should be improved:

Chapter 157, First Session, Fifty-second Congress, July 13, 1822.

Chapter 1079, First Session, Fifty-seventh Congress, 1902.

Chapter 264, Second Session, Forty-ninth Congress, May 18, 1876.

The James street bridge, the Kansas Pacific (now Union Pacific Railway bridge) and the Southern road bridge at Kansas City were reported as obstructions to navigation by J. D. McKown, assistant United States engineer, February 15, 1879, and their removal recommended. The bridges above named

were destroyed by the flood of 1903. (See printed report contained in letter to Secretary of War, Ex-Doc. No. 94, 3d Session, 45th Congress, February 15, 1879.)

Chapter 348, Statutes of United States, First Session, Fortyninth Congress, is as follows:

"AN ACT authorizing the Inter-State Rapid Transit Railway Company to build a bridge across the Kansas river.

"Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the Inter-State Rapid Transit Railway Company, a corporation duly and legally organized and existing under and by virtue of the laws of the state of Kansas, its successors or assigns, be, and is hereby, authorized to construct and maintain a bridge and approaches thereto over the Kansas river in Wyandotte, in the state of Kansas, between the city of Wyandotte and the City of Kansas, Kansas, at the point where said company's line of railway, as now projected, crosses said river near the mouth thereof.

"SEC. 3. That no bridge shall be erected or maintained under the authority of this act which shall at any time substantially or materially obstruct the free navigation of said river; and if any bridge erected under such authority shall, in the opinion of the Secretary of War, obstruct such navigation, he is hereby authorized to cause such change or alteration of said bridge to be made as will effectually obviate such obstruction; and all such alterations shall be made and all such obstructions be removed at the expense of the owner or owners of said bridge; and in case of any litigation arising from any obstruction or alleged obstruction of the free navigation of said river, caused or alleged to be caused by said bridge, the case may be brought in the circuit court of the United States in and for the district of Kansas; provided, that nothing in this act shall be so construed as to repeal or modify any of the provisions of law now existing in reference to the protection of the navigation of rivers, or to exempt said bridge from the operation of the same. . . .

"Approved May 17, 1886.

"(Statutes of the United States: 1st Session, 49th C., 1885-'86.)"

In view of the foregoing and of the fact that the river has never been held to be nonnavigable, we submit that it must be regarded for all purposes of this case as navigable.

Prior to the Formation of States the Title to the Beds of Navigable Rivers Was Held by the United States in Trust for Future States.

It seems now to be well settled by the adjudications of this court that the title to the lands underlying navigable waters belongs to the sovereignty having jurisdiction over the territory in which such waters are situated as an attribute of its sovereignty; that all states admitted to the Union after the union of the original thirteen states were admitted upon an equality with and with powers and sovereignty equal to those of all other states including the original thirteen states; that since the ownership of lands underlying navigable waters is an attribute of sovereignty, new states must be given this attribute when they become states; and that therefore territory held by the United States outside of the original thirteen states was held by the United States in trust to deliver full sovereignty over that territory to new states as they should be erected therein.

It follows that the United States, while holding title to the territory which was afterwards incorporated into the state of Kansas, could not of right have conveyed title to lands underlying navigable waters in that territory. In this connection it is conceded, of course, that the United States, in the exercise of powers granted to it by the constitution (as for the improvement of navigation between states), could have appropriated or conveyed such lands, and also that valid grants made before the acquisition of the territory by the United States must be recognized.

In considering the cases on this question no distinction will be made between cases involving lands under tidal waters and those involving lands under navigable nontidal waters, for the reason that this court in considering the title to lands underlying the Mississippi river, in *Barney v. Keokuk*, 94 U. S. 324, said:

"The confusion of navigable with tidewater, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the founda-

tion, in many states, of doctrines with regard to the ownership of the soil in navigable waters above tidewater at variance with the sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietors rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367, *Pollard v. Hagan* (supra), and *Goodtitle v. Kibbe*, 9 How. 471. *These cases related to tidewater, it is true, but they enunciate principles which are equally applicable to all navigable waters.* And since this court, in the case of *Genesee Chief v. Fitzhugh*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated."

Italics are counsel's.

Pollard v. Hagan, 3 How. 212 (1845), is the leading case on this question. That was an action in ejectment. The plaintiff claimed under a patent from the United States issued in 1835 (some years after the admission of Alabama as a state) and describing by metes and bounds territory which included the land in question. Defendant's contention was that that land was below the usual high-water mark of Mobile bay when the state was admitted, and that the patent was therefore void as to these lands, and the trial court submitted the case to the jury on that issue. Upon writ of error to this court, Mr. Justice MCKINLEY, speaking for the court (Mr. Justice CATRON dissenting), said:

"We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction or right of soil in and to the territory of which Alabama or any of the new states were formed, except for temporary purposes, and to execute the trusts created by the

acts of Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana.

"When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it. Nothing remained to the United States, according to the terms in the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain within the limits of a state or elsewhere except in the cases in which it is expressly granted.

"By the sixteenth clause of the eighth section of the first article of the constitution, power is given to Congress 'to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same may be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings.' Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government of every description are united in the government of the Union. And these are the only cases within the United States in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists. The right of Alabama and every other new state to exercise all the powers of government which belong to and may be exercised by the original states of the Union must be admitted and remain unquestioned except so far as they are temporarily deprived of control over the public lands.

"We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of the old states, of their waste and unappropriated lands to the United States, under a resolution of the old Congress of the 6th of September, 1780, recommending

such surrender and cession to aid in paying the public debt incurred by the War of the Revolution. The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished the power of the United States over these lands, as property, was to cease.

"Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete throughout their respective borders, and they and the original states will be upon an equal footing in all respects whatever. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess or have reserved by compact with the new states, for that particular purpose. The provision of the constitution above referred to shows that no such power can be exercised by the United States within a state. . . .

"Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the constitution, laws and compact to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin et al. v. Waddell* (16 Peters, 410) the present chief justice, in delivering the opinion of the court, said: 'When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution.' Then to Alabama belong the navigable waters and soils under them in controversy in this case, subject to the rights surrendered by the constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights."

"This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their

hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the constitution of the United States 'and the laws which shall be made in pursuance thereof.'

"By the preceding course of reasoning we have arrived at these general conclusions: First, the shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states, respectively. Second, the new states have the same rights, sovereignty and jurisdiction over this subject as the original states. Third, the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

Goodtitle v. Kibbe, 9 How. 471 (1850), was a similar case except that the plaintiff claimed under an early inchoate Spanish grant which was confirmed by the United States after the admission of Alabama as a state. This court followed its decision in *Pollard v. Hagan*, supra, saying:

"The decision of the supreme court of Alabama, from which this case has been brought by writ of error, conforms to the opinion of this court in the case of *Pollard v. Hagan*. And it must be a very strong case indeed, and one where mistake and error had been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the meantime, upon the faith and confidence reposed in the judgment of this court."

In *Withers v. Buckley*, 20 How. 84 (1857), the state of Mississippi had passed an act for the improvement of a river. It was contended that this act was in violation of the act of Congress which authorized the people of the territory to form a constitution and which declared "that the Mississippi river and the navigable rivers and waters leading into the same shall be common highways and forever free. . . ."

There the court said:

"In considering this act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to

its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new state in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the constitution adopted by the states, and from the rule of interpretation pronounced by this court in the case of *Pollard's Lessee v. Hagan*, 3 How., p. 223. The act of Congress of March 1, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into this river, could not have been designed to inhibit the power inseparable from every sovereign or efficient government, to devise and to execute measures for the improvement of the state, although such measures might induce or render necessary, changes in the channels or courses of rivers within the interior of the state, or might be productive of a change in the value of private property." . . .

"Could such an intention be ascribed to Congress the right to enforce it may be confidently denied. Clearly, Congress could exact of the new state the surrender of no attribute inherent in her character as a sovereign independent state, or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the federal compact."

In *Weber v. Harbor Com'rs*, 18 Wall. 57 (1873), this court said:

"Although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union upon equal footing with the original states, absolute property in and dominion and sovereignty over all soils under the tidewaters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government. *Pollard v. Hagan*, 3 How. 212; *Mumford v. Wardwell*, 6 Wall. 436 (73 U. S. XVIII, 761)."

In *Hardin v. Jordan*, 140 U. S. 371 (1890), plaintiff claimed title to a part of the bed of a navigable lake under a patent

from the United States to land bounded by that lake. There this court said:

"It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render title uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters.

"With regard to grants of the government for lands bordering on tidewater, it has been distinctly settled that they only extend to highwater mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and can not be retained or granted out to individuals by the United States. *Pollard v. Hagan*, 44 U. S. 3 How. 212 (11:565); *Goodtitle v. Gibbe*, 50 U. S. 9 How. 471 (13:220); *Weber v. Board of Harbor Com'rs*, 85 U. S., 18 Wall. 57 (21:798).

"This right of the states to regulate and control the shores of tidewaters, and the land under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent his prerogative of the state over the lands under water shall be exercised. In the case of *Barney v. Keokuk*, 94 U. S. 324 (24:224), we held that it is for the several states themselves to determine this question, and that if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections."

In *Knight v. United Land Ass'n*, 142 U. S. 161 (1891), the question involved as stated by the court was:

"The controversy involves an interesting question of title to the property described, the plaintiffs asserting that the premises were below the line of ordinary high-water mark at the date of the conquest of California from Mexico, and, therefore, upon the admission of the state into the Union in 1850, inured to it in virtue of its sovereignty over tide lands; and the defendant insisting that the lands are a portion of the pueblo of San Francisco, as confirmed and patented by the United States."

There the court said:

"It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty, and jurisdiction in that behalf as the original states possess within their respective borders. *Martin v. Waddell*, 41 U. S., 16 Pet. 367, 410 (10:997, 1012); *Pollard v. Hagan*, 44 U. S., 3 How. 212, 229 (11:565, 573); *Goodtitle v. Gibbe*, 50 U. S., 9 How. 471, 478 (13:230, 223); *Mumford v. Wardwell*, 73 U. S., 6 Wall. 4423, 436 (18:756, 761); *Weber v. State Harbor Comr's*, 85 U. S., 18 Wall. 57, 65 (21:798, 801.) Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future states that might be erected out of such territory. Authorities last cited. But this doctrine does not apply to lands that had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way. *San Francisco v. LeRoy*, 138 U. S., 656 (34:1096). For it is equally well settled that when the United States acquired California from Mexico by the Treaty of Guadalupe Hidalgo (9 Stat. at L. 922), they were bound, under the 8th article of that treaty, to protect all rights of property in that territory emanating from the Mexican government previous to the treaty. *Teschmacher v. Thompson*, 18 Cal. 11; *Beard v. Federy*, 70 U. S., 3 Wall. 478 (18:88)."

In *Shively v. Bowlby*, 152 U. S. 1 (1893), the issues as stated by the court were as follows:

"James M. Shively, being the owner, by title obtained by him from the United States under the act of Congress of September 27, 1850, chap. 76, while Oregon was a territory, of a tract of land in Astoria, bounded north by the Columbia river, made a plat of it, laying it out into blocks and streets, and including the adjoining lands below high-water mark, and conveyed four of the blocks, one above and three below that mark, to persons who conveyed to the plaintiffs. The plaintiffs afterwards obtained from the state of Oregon deeds of conveyance of the tide lands in front of these blocks, and built and maintained a wharf upon part of them. The defendant, by counterclaim, asserted a title, under a subsequent conveyance, from Shively, to some of the tide lands, not included in his former deeds, but included in the deeds from the state.

"The counterclaim, therefore, depended upon the effect of the grant from the United States to Shively of land bounded

by the Columbia river, and of the conveyance from Shively to the defendant, as against the deeds from the state to the plaintiffs."

In a very exhaustive opinion in that case Mr. Justice GRAY, speaking for the court, said:

"I. By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the king as the sovereign; and the dominion thereof *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

"II. The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the constitution and laws of the United States. . . .

"III. The governments of the several colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark than they had in England. But the nature and degree of such rights and privileges differed in the different colonies, and in some were created by statute, while in others they rested upon usage only. . . .

"IV. The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands below the high-water mark, within their respective jurisdictions. . . .

"V. That these decisions do not, as contended by the learned counsel for the plaintiff in error, rest solely upon the terms of the deed of cession from the state of Georgia to the United States, clearly appears from the constant recognition of the same doctrine as applicable to California, which was acquired from Mexico by the Treaty of Guadalupe Hidalgo of 1848.

"VI. The decisions of this court, referred to at the bar, regarding the shores of waters where the ebb and flow of the tide

from the sea is not felt, but which are really navigable, should be considered with reference to the facts upon which they were made, and keeping in mind the local laws of the different states, as well as the provisions of the acts of Congress relating to such waters. . . .

"VII. The later judgments of this court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United States by the constitution. . . .

"VIII. Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true. . . .

"We can not doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory.

"IX. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek. . . .

" 'The title to the shore and lands under tidewater,' said Mr. Justice BRADLEY, 'is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery.' *Hardin v. Jordan*, 140 U. S. 371, 381 (35:428, 433). And the territories acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects; and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, 'in trust for the future states.' *Pollard v. Hagan*, 44 U. S., 3 How. 212, 221, 222 (11:565, 570); *Weber v. State Harbor Comr's*, 85 U. S., 18 Wall. 57, 65 (21:798, 801); *Knight v. United Land Asso.*, 142 U. S. 161, 183 (35:974, 981).

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands,

whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.

"X. The title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States; as well as upon the cession of the Louisiana territory by France in the treaty of 1803, and the renunciation of the claims of Spain in the treaty of 1819. . . .

"The settlers of Oregon, like the colonists of the Atlantic states, coming from a country in which the common law prevailed to one that had no organized government, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefore, is based on the common law. . . .

"By the law of the state of Oregon, as declared and established by the decisions of its supreme court, the owner of upland bounding on navigable water has no title in the adjoining lands below high-water mark, and no right to build wharves thereon, except as expressly permitted by statutes of the state; but the state has the title in those lands, and, unless they have been so built upon with its permission, the right to sell and convey them to any one free of any right in the proprietor of the upland, and subject only to the paramount right of navigation inherent in the public. . . ."

The court then concluded (p. 57) :

"Lands under tidewaters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by indi-

viduals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

"At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, *in trust* for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders, subject to the rights surrendered by the constitution to the United States.

"Upon the acquisition of a territory by the United States, whether by cession from one of the states or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.

"The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the constitution.

"The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tidewaters. But they have never done so by general laws; and unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States."

Italics are counsel's.

In *Kansas v. Colorado*, 206 U. S. 46 (1906), this court said (p. 93) :

"But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters. . . .

"In *Barney v. Keokuk*, supra, Mr. Justice BRADLEY said (p. 338, L. ed., p. 228) :

"And since this court, in the case of *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. ed. 1058, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reasons for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.'

"In *Hardin v. Jordan*, supra, the same justice, after stating that the title to the shore and lands under water is in the state, added (pp. 381, 382, L. ed., p. 433, Sup. Ct. Rep., p. 812) :

"Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce.' "

In *United States v. Chandler-Dunbar Co.*, 209 U. S. 447 (1907), this court said (p. 451) :

"The bed of the river could not be conveyed by the patent of the United States alone, but, *if such is the law of the state, the bed will pass to the patentee by the help of that law*, unless there is some special reason to the contrary to be found in cases like *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110. This view is well established. *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 93, 94, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; *Hardin v. Shedd*, 190 U. S. 508, 519, 47 L. ed. 1156, 1157, 23 Sup. Ct. Rep. 685."

Italics are counsel's.

In *Coyle v. Smith*, 221 U. S. 559 (1910), this court said:

"The power of Congress in respect to the admission of new states is found in the 3d section of the 4th article of the constitution. That provision is that, 'new states may be admitted by the Congress into this Union.' The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress.

"The power is to admit 'new states into *this* Union.'

"'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and second, that such new states might not exercise all of the powers which had not been delegated by the constitution, but only such as had not been further bargained away as conditions of admission.

"The case of *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565, is a most instructing and controlling case. It involved the title to the submerged lands between the shores of navigable waters within the state of Alabama. . . .

"The points decided were:

"First, following *Martin v. Waddell*, 16 Pet. 410, 10 L. ed. 1012, that prior to the adoption of the constitution, the people of each of the original states 'hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the constitution.

"Second. That Alabama had succeeded to all the sovereignty and jurisdiction of all the territory within her limits, to the same extent that Georgia possessed it before she ceded that territory to the United States.

"Third. That to Alabama belong the navigable waters, and soils under them. . . .

"The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to

the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."

The act for the admission of Kansas as a state (12 Stat. at Large, 126) provided, in section 1:

"That the State of Kansas shall be, and is hereby declared to be, one of the United States of America, and *admitted into the Union on an equal footing with the original states in all respects whatever.* . . ."

As is pointed out in the authorities above quoted, the title to lands underlying the navigable waters in the territory now forming the state of Kansas was, and always has been, in the sovereign having jurisdiction over that territory as an attribute of its sovereignty. After the acquisition of that territory by the United States and before the organization of Kansas as a state, the United States could exercise over that territory such sovereignty as was vested in it by the constitution and its powers with reference to that territory were the same before the organization of the state as after. All other powers of sovereignty were held by the United States in trust for the new state so that that state might be admitted into the Union on an equal footing with the other states.

It is clear that in the act authorizing the admission of Kansas, Congress could not have retained title to lands underlying the navigable waters nor could Congress have admitted the state upon condition that such title should remain in the United States. As is pointed out in the authorities above cited, if this were done, the constitution would not be the full measure of the sovereignty of the United States, but the constitution plus certain acts of Congress would be that measure; and the United States would have those powers only which are conferred by the constitution in some states and in other states would have the powers so conferred and also powers reserved to itself by the acts authorizing the admission of states.

Since the United States could not retain this attribute of sovereignty, it could not vest it in another and so deprive the future state of it.

The Act of the Territorial Legislature Adopting the Common Law.

Counsel for plaintiffs in error lay much stress upon the Act of the Territorial Legislature of 1859, which provides:

"The common law of England and all statutes and acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the constitution of the United States and the act entitled 'An act to organize the territory of Nebraska and Kansas' or any statute law which may from time to time be made or passed by this or any subsequent legislative assembly of the territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding." (Laws of Kan. 1859, p. 615.)

It is argued that since, by the common law of England, owners of riparian land on navigable, nontidal rivers held title to the thread of the stream, the patents under which plaintiffs in error claim granted such title here.

This court has already passed upon this exact question in *Kansas v. Colorado*, 185 U. S. 125, and 206 U. S. 46. In the brief filed in opposition to the demurrer passed upon in 185 U. S. 125, counsel for the plaintiff, State of Kansas, laid great stress upon the statute above quoted and upon the earlier territorial statute of 1855, which was substantially the same and also upon *Clark v. Allaman*, 71 Kan. 206, in which these and earlier like statutes were also referred to. That this was done is not shown by the decision in 185 U. S. 125, but is shown by the brief filed in opposition to that demurrer.

In the decision rendered by this court when that case was decided upon the merits (206 U. S. 46, 95), this court said:

"In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into states. See also the opinion of the supreme court of Kansas in *Clark v. Allaman*, 71 Kan. 206, 70 L. R. A. 971, 80 Pac. 571. *But when the states of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states* (*Pollard v. Hagan* and *Shively v. Bowlby*, *supra*; *Hardin v. Shedd*, 190 U. S. 508, 519, 47 L. ed. 1156, 1157, 23 Sup. Ct. Rep. 685), and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purposes of irrigation."

Italics are counsel's.

We take this to mean that no common-law doctrine was or could have been forced upon the territory which would have the effect of depriving the state when formed of any of the rights of sovereignty which were exercised by the older states; and no other decision was possible.

Territorial governments are mere agencies of Congress formed for purposes of local government of otherwise unorganized territory. Section 3, article IV of the constitution provides:

“ . . . The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . . ”

In *Treadway v. Schnauber*, 46 N. W. (Dak.) 464, the court said:

“The territorial legislature is a creature of Congress. Its powers, duties and sessions are defined and limited by the act organizing the territory and the amendments thereto, and it derives no life or power from any other source.”

It follows, of course, that Congress could not authorize the territorial legislature to do anything which Congress itself could not do. Congress could not convey the bed of the river; therefore it could not authorize the territorial legislature to so legislate that patents issued under authority of Congress would convey the bed of the river.

“The bed of the river could not be conveyed by the patent of the United States alone, but, if such is the law of the state the bed will pass to the patentee by the help of that law. . . . ” *U. S. v. Dunbar Co.*, 209, U. S. 447, 451.

The argument for plaintiff in error must be: Congress itself could not authorize the conveyance by patent of the bed of the river; but Congress could authorize the territorial legislature to adopt the common law, the effect of which would be to make a patent to riparian lands pass title to the bed of the river. This is clearly unsound.

Apart from the question of power, however, it can not be held that the territorial statute has the effect claimed. The territorial legislature could not adopt any part of the common law of England which was repugnant to the constitution of the

United States or of the act creating the territory and its legislature or any other act of Congress.

The act if held to adopt that part of the common law which gave riparian owners title to the thread of navigable nontidal streams would as already pointed out be repugnant to the constitution in that the constitution provides that all states shall have equal rights of sovereignty.

In order to comprehend fully the repugnancy of the English common law relating to navigable nontidal streams to the enabling act and other acts of Congress the court must clearly have before it the effect of that law.

Lord Chief Justice HALE, in his *De Jure Maris*, as reprinted in Moore and Hall, History and Law of Foreshore, pp. 370, 371, 372, says:

"Fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquæ*; and the owners of the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side. And if a man be owner of the land on both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience.

"Though fresh rivers are in point of propriety as before *prima facie* of a private interest; yet as well fresh rivers as salt, or such as flow and reflow, may be under these two servitudes, or affected with them, viz., one of prerogative belonging to the king, and another of public interest, or belonging to the people in general."

It will be noted that it is said in the foregoing quotation that fresh water rivers *may be* under a servitude to the public, *i. e.*, for navigation. That there is not now and never was a common law right of navigation is now well settled. In Hubert Stewart Moore's article on Waters and Watercourses, in volume 28 of the Earl of Halsbury's Laws of England, p. 398, secs. 760 and 762, it is said:

"The public may have a right to navigate nontidal rivers, but there is no general common-law right to do so. Such right as the public has can only have arisen by grant from the owner of the soil of such rivers, or by immemorial usage, or by act of Parliament, and the right to navigate is established by evidence similar to that which would raise the presumption of a right of way on land.

"The right of navigation in nontidal water may extend to the whole width of the river, or may be limited to a portion or particular channel of the river, or to certain reaches thereof.

"The right of navigation, when established over nontidal waters, is similar in character to the right of navigating tidal waters."

Under the common-law doctrine applicable to nontidal rivers, therefore, the owner of the bed of the river has the exclusive right of fishery and the right to prevent navigation unless the public has acquired the right of navigation by grant or prescription. As there could be no prescriptive right of navigation at the time when a patent was issued by the government the application of the common-law doctrine would permit riparian owners to prohibit navigation.

The territory through which the Kansas river flows was a part of the Louisiana Purchase. The whole of the territory purchased was divided into the District of Louisiana (which included the territory which is now Kansas) and the District of Orleans. In 1811 (2 Stat. at Large, 666) present section 5251, Rev. Stat., was passed, which provided:

"All the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways."

In 1812 Missouri Territory was erected, and § 15 of that act in part provided:

"The Mississippi and Missouri rivers and the navigable waters flowing into them, and the carrying places between the same, shall be common highways and forever free to the people of said territory, and to the citizens of the United States without any tax, duty or impost therefor."

Here were direct enactments that the Kansas river should forever remain a public highway, and a direct dedication of that river to the public as a free common highway. Clearly the Kansas territorial legislature could not, by the adoption of the common law, repeal these statutes.

The act creating Kansas territory provided, in section 24, that "no law shall be passed interfering with the primary disposal of the soil." If the title to the bed of the Kansas river was vested in the patentees through whom plaintiffs in error claim it was so vested by virtue of the territorial statute adopting the common law, and not by virtue of the patents

issued by the United States to them. (*U. S. v. Chandler Dunbar Co.*, 209 U. S., 447, 451.) That territorial statute then, if construed as claimed by plaintiffs in error, clearly interfered with the primary disposal of the soil.

We submit, therefore, that the territorial statute did not, and could not, by adopting the common law, vest the title to the bed of the Kansas river in the patentees under whom plaintiffs in error claim.

The Adoption of the Territorial Statute by the State of Kansas.

By the schedule adopted with the Kansas constitution to cover the transition from a territorial to a state government it was provided that—

“All laws and parts of laws in force in the territory at the time of the acceptance of this constitution by congress, not inconsistent with this constitution shall continue and remain in full force until they expire or shall be repealed.” (§ 266, Gen. State. of Kan. 1915.)

This merely continued the territorial statute in force with the same meaning, force and effect that it had before Kansas became a state. It added nothing to it.

Moreover, only such laws as were not inconsistent with the Kansas constitution remained in force. The moment that constitution went into effect and Kansas became a state that state became entitled to the lands underlying all navigable waters. Any law which vested such lands in private individuals without compensation would be inconsistent with the constitution.

Winters v. Myers, 92 Kan. 414.

In that case the statute there under consideration provided that lands which had formerly been islands in beds of navigable streams but which had been attached to the main land for more than 20 years should be treated as accretions and should belong to the owners of the land to which they were attached. This statute was held to be void. The syllabus by the court is as follows:

“1. TITLE TO ISLANDS IN NAVIGABLE STREAMS. The title to islands formed in navigable streams since the admission of Kansas into the Union is held by the state for the benefit of all the people.

"2. SAME—*Legislature May not Relinquish Such Title to Private Individuals.* The legislature is without power to relinquish the title to such islands to the owners of shore lands without compensation where no public benefit will result from the gift.

"3. SAME—*Statute Authorizing Relinquishment of Title to Islands in Navigable Streams is Unconstitutional.* Section 9 of chapter 295 of the Laws of 1913, concerning islands in navigable streams, which provides for such relinquishment or gift when certain conditions exist, violates section 2 of the bill of rights which declares that free governments are instituted for the equal protection and benefit of the people."

This construction of the state constitution is of course binding upon this court as a "part of the fundamental law of the state."

Webster v. Cooper, 14 How. 488, 504.

So Far as It Relates to Title the Question of Navigability is a State and Not a Federal Question.

We have, we think, already shown that the Kansas river is navigable from both a state and a federal standpoint. So far as this question of navigability affects any question of title it is purely a state question upon which the decision of the highest state court is final.

In *Donnelly v. U. S.*, 228 U. S. 243, this court said:

"It has been held in effect that what are navigable waters of the United States, within the meaning of the act of Congress, in contradistinction to the navigable waters of the states, depends upon whether the stream in its ordinary condition affords a channel for useful commerce. . . .

"But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states. Thus, the state of California, if she sees fit, may confer upon the riparian owners the title to the bed of any navigable stream within her borders."

In other words there is a federal question of navigability upon which depends the admiralty jurisdiction of the courts and other questions of purely federal cognizance and a state question upon which depend titles. This latter question is, and of necessity must be, purely a state question. It is a question of sovereignty. States as a part of their sovereignty have jurisdiction over navigable waters subject only to the power

of Congress with reference to interstate and foreign commerce. This power of sovereignty is unlimited except by the federal constitution. But if this power may be exercised only after some other sovereignty has declared what waters are navigable it is not a power of sovereignty but a power which may be exercised only by the grace of some other sovereignty. That state is not a sovereign state which may not declare the objects within its territory over which its sovereignty extends. Accordingly for purposes of the settlement of all state questions which depend upon navigability the decision of the state courts must be final. And this is the effect of all of the authorities.

"It depends upon the law of each state *to what waters* and to what extent this prerogative of the state over the lands under water shall be exercised."

Hardin v. Jordan, 140 U. S. 371.

The question of the effect of a patent from the United States which purported to convey title to lands underlying rivers which were not meandered but which the state court held to be navigable is not involved here and it is not necessary to decide what the answer to that question would be. Here the river was meandered and the United States patented lot 5. To ascertain what land was contained in lot 5, reference had to be made to the plat prepared by the government surveyors which showed the boundaries of that lot. The patent was therefore in effect a conveyance by metes and bounds one of the boundaries being the meander line or the high-water mark of the river. The title of the patentee and his successors in title including plaintiffs in error to the land actually described in the patent is not contested. The only question is as to the incidents which attach to the ownership of the property conveyed; and this question is purely a state question whether the meandered stream be navigable or nonnavigable.

Packer v. Bird, 137 U. S. 661.

There the court said:

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by

the grantee. As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low- or high-water mark, or will extend to the middle of the stream."

As was said in *U. S. v. Chandler-Dunbar Co.*, 209 U. S. 447, 451, if the title to the bed of the stream was vested in the patentee as an incident to his ownership of the riparian lands it was so vested by virtue of the state laws, since the United States did not attempt to convey it. Since the United States did not attempt to convey it, the question of title to the bed of the stream must be a state question and the decision of the state court on the question of navigability, made for the purpose of deciding that question, must be final and conclusive upon this court.

The Kansas Law as to Riparian Ownership.

It has always been the law in Kansas that the owners of lands bounded by streams held by the state courts to be navigable had title only to the high-water mark, and that the bed of the stream belonged to the state.

Wood v. Fowler, 26 Kan. 682.

Kregar v. Fogarty, 78 Kan. 541.

The State v. Akers, 92 Kan. 169.

Winters v. Myers, 92 Kan. 414.

Dana v. Hurst, 86 Kan. 947.

Peuker v. Canter, 62 Kan. 362.

Black v. Diver, 68 Kan. 204.

Fowler v. Wood, 73 Kan. 511.

The Statute of 1864.

Chapter 180, Session Laws of Kansas of 1864, is as follows:

"SEC. 1. That the Kansas, Republican, Smoky Hill, Solomon and Big Blue rivers, within the limits of the state of Kansas, are hereby declared not navigable streams or rivers.

SEC. 2. Any railroad or bridge company, having a charter under any general or special law of the state of Kansas, shall have the same right to bridge or dam said rivers as they would have had *if they never had been declared navigable streams.*"

The patent under which plaintiffs in error claim was granted in 1860.

In *Wood v. Fowler*, 26 Kan. 682, 688, the court said of this statute:

"It is true in 1864 (Laws 1864, p. 180) an act was passed by the state legislature declaring the Kansas and certain other rivers not navigable; but the plain implication of the act is that the streams had theretofore been considered navigable, and its purpose was to sanction the bridging and damming of such streams. It certainly was not the purpose, and the act had not the effect, to enlarge the title of the riparian owners, or to recognize them as possessed of higher rights than heretofore. Indeed, where title is once vested, a mere change in the condition or character of the current or the uses to which the stream is put, will not transfer any title (*People v. Tibbets*, 19 N. Y. 527; *Wheeler v. Spinola*, 54 N. Y. 377.) It was an assertion of state control over a stream wholly within its territorial limits; a control which, notwithstanding the general supremacy of the federal government over navigable streams, was asserted to exist in the state in the case of *Naederhauser v. The State*, 28 Ind., *supra*, as well as in many other authorities. So that for all the purposes of this case, and any question in it, we may assume that the Kansas is, at the point in controversy, a navigable stream."

In *Kregar v. Fogarty*, 78 Kan. 541, 547, the court said:

"Chapter 97 of the Laws of 1864, declaring the Smoky Hill and other rivers not navigable, does not conclusively establish the fact that they were navigable before, although affording an implication that they had theretofore been so considered. The purpose of that act was to sanction the building of bridges and dams across them. (*Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330.)"

The Power of the State to Regulate the Taking of Sand.

It is alleged in the answer of plaintiffs in error that the sands in the Kansas river are not fixed and immovable and that they do not form a fixed and immovable stratum under the river, but that they are "shifting, unfixed, migratory, elusive and fugitive in their nature, mixed and moving with the waters of the river in the direction of and with the flow of such waters." (Trans. 12.)

And upon these allegations counsel attempt to base an argument that the sand is as incapable of ownership as are wild beasts and birds. These allegations must be considered by the court in the light of such knowledge as is common to all mankind. In every river having a sandy bed the sands shift. Sand

bars are formed here to-day and washed away to-morrow. This is true also to a large extent of shallow sandy shores of the sea and of the Great Lakes. But plaintiffs in error do not take sand while it is sustained by and carried with the water. They dredge it. (Trans. 15.) To dredge is:

"To remove sand, silt, mud, etc., from the bottom of: as to dredge harbor, river or canal." (Cent. Dict., Tit. Dredge.)

Plaintiffs in error dredge or dig the sand from the river bottom. It is shifting as are the sandy beds and banks of all waters, but still it forms a part of the bed of the river.

The court below disposed of this contention as follows (trans. 83):

"The argument that because the sand is in constant motion it falls within the principle of *ferre naturæ*, and that the defendants can not be deprived of the valuable right of an individual to reduce to his possession wild animals or things of that nature does not impress us as sound. We have examined the seaweed cases cited, and do not think they support the claim of the defendants. They merely hold that seaweed cast by the tide and waves upon the land of a riparian proprietor becomes his property just as wreckage cast upon his lands belongs to him. (*Church v. Meeker*, 34 Conn. 421.) Many of the cases are controlled by statutes conferring certain rights upon the owners of riparian lands adjoining tidewater, such as the case cited in 2 Allen (84 Mass.) 549 (*Anthony v. Gifford*). The opinion expressly declares that these marine products do not become the property of the riparian proprietor until they are cast upon or attached to the land or shore. There is nothing in chapter 259 which seeks to deprive the defendants of the right to any sand cast upon their lands."

That the state may sell such sand or charge for the privilege of removing it is now well settled by the authorities. In *State, ex rel., v. Southern S. & M. Co.*, 167 S. W. (Ark.) 854, the court had under consideration a law similar to the Kansas statutes. There the court said:

"In other words, there is a union in the state governments of America of all the powers of king and Parliament in England over navigable waters and the beds thereof, subject only to the paramount jurisdiction of the United States for the control of navigation.

"In the decisions there are references made to the proprietary rights of the English kings, a term which has no place in our system of government, as all rights of the sovereign under the American system are exercised, and all property rights

held, for the benefit of the people. All of the property rights which are held in common by the people of our states are subject to the control of the legislative branch of government, save certain inalienable rights which the individual citizen does not yield up to the government, and the power of the sovereign people is complete in the regulation and disposition of those rights.

"Chief Justice BEASLEY, speaking for the New Jersey court of errors and appeals, in the case of *Stevens v. P. & N. R. Co.*, 34 N. J. Law, 532, 3 Am. Rep. 269, said:

"The principle seems universally conceded that, unless in certain particulars protected by the federal constitution, the public rights in navigable rivers can, to any extent, be modified or absolutely destroyed by statute. . . . But the dominion . . . over *jura publica* appears to be unlimited. By this power they can be regulated, abridged, or vacated. We have seen that, by the common law, the king was the proprietor of the soil under the navigable water, and this, being regarded as a private emolument of the crown, was susceptible of a transfer to a subject. But such transfer did not divest or diminish, at least after Magna Charta, the public rights in the water, and consequently the grantees of the crown held the property in subjection to the common privilege of fishery and navigation. The consequence was that the king could not deprive the subjects of the realm of these general rights. This was a power that resided in Parliament, and not in the monarch.'

"Mr. Farnham, in his work on Waters and Water Rights (volume 1, p. 260), says:

"The king never held any of the nontidal rivers in trust until he was compelled to convey his waste land in trust for the public, and after that time Parliament and the king held the whole title, which they could dispose of as they saw fit, subject to existing rights of navigation in the stream. The American states succeeded to all the title held by both the king and Parliament, and there is nothing to prevent them from making any grant which they may wish to make.'

"(3) Now the state can not delegate its trusteeship by disposing of navigable waters or beds thereof, for one legislature might resume a power which had been surrendered by its predecessor; but it is quite another thing to say that the legislature, in the exercise of its control over the beds of streams, can not grant the right, upon terms or for a price named, to

take sand or gravel, call it a sale, or a regulation, as it may please one to term it. The bed of the stream being held by the sovereign for the benefit of the citizens, that right may be enjoyed in the way that the legislative branch of government may determine for the benefit of the public, and it is not inconsistent with a public use to require those who actually take sand and gravel to pay for it so that the benefits may be diffused among all of the people of the state."

That decision has since been adhered to by that court.

Southern S. & M. Co. v. State, 121 Ark. 1.

Johnson S. & G. Co. v. Quarles, 121 Ark. 601.

Union S. & M. Co. v. State, 192 S. W. (Ark.) 380. Petition for certiorari to this court denied, 37 S. C. R. 478.

In *State v. Pacific Guano Co.*, 22 S. C. 50, 83, the court said :

"The state had in the beds of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum*, consisting of the rights, powers, and privileges derived from the British crown, and belonging to the governing head, which she held in a fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the state, and in respect to which she had trust duties to perform. 3 Kent, 377; *Martin v. Waddell*, 16 Peters, 367; *Commonwealth v. Roxbury*, 9 Gray, 451. The absolute rule heretofore referred to, limiting landowners bounded by such streams to the high-water mark, unless altered by law or modified by custom, accords with the view that the beds of such channels below low-water mark are not held by the state simply as vacant lands, subject to grant to settlers in the usual way through the land office.

"There seems to be no doubt, however, that the state as such trustee has the power to dispose of these beds as she may think best for her citizens; but not being, as it seems to us, subject to grant in the usual form under the provisions of the statute regulating vacant lands, it would seem to follow that in order to give effect to an alienation which the state might undertake to make it would be necessary to have a special act of the legislature expressing in terms and formally such intention. In this view, the state, asserting her rights to the deposits 'in the beds of the navigable streams and waters of the state,' has, by numerous special acts of her legislature, granted licenses to different companies to mine in these beds, imposing penalties on those who undertake to do so without such license. General Statutes, § 65."

See, also, in connection with the case last cited, *Coosaw Mining Co. v. S. C.*, 144 U. S. 550.

In *Weber v. Harbor Com'rs*, 18 Wall. 57, the court said:

"Upon the admission of California into the Union upon equal footing with the original states, *absolute property in and dominion and sovereignty over all soils under the tidewaters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper*, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the General Government. *Pollard v. Hagan*, 3 How., 212; *Mumford v. Wardwell*, 6 Wall., 436 (73 U. S. XVIII., 761.)"

Italics are counsel's.

In *McCready v. Virginia*, 94 U. S. 391, this court said:

"The planting of oysters in the soil covered by water owned in common by the people of the state is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the state, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a state may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow that it might by appropriate legislation confine the use of the whole to its own people alone."

In *Hardin v. Jordan*, 140 U. S. 371, this court said:

"Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. See *Manchester v. Massachusetts*, 139 U. S. 240 (35:159); *Smith v. Maryland*,

59 U. S. 18 How. 71 (15:269) ; *McCready v. Virginia*, 94 U. S. 391 (24:248) ; *Martin v. Waddell*, 41 U. S., 16 Pet. 367 (10:997) ; *Den v. Jersey Co.*, 56 U. S., 15 How. 426 (14:757)."

In *Scott v. Lattig*, 227 U. S. 229, 242, this court said :

"Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the federal and state governments under the constitution, that lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty, and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations."

It is clear under these authorities that the right of the state to sell or to charge for the privilege of removing sand from the bed of the Kansas river can not be questioned.

There Can be No Right by Prescription.

Upon this branch of the case we are willing to rest upon the decision of the court below, as follows :

"The defendants' claim by prescription can not be sustained. There is some conflict in the authorities as to whether a right may be obtained by prescription against the public, especially in regard to rights in property dedicated to public use, such as streets and highways. Some hold that rights of this character may be acquired, and others that they can not. In Pennsylvania it is settled that public rights are not destroyed by long-continued encroachments or permissive trespasses. (*Kittaning Academy v. Brown*, 41 Pa. St. 269. See, also, *Commonwealth v. Moorehead*, 118 Pa. St. 344, 12 Atl. 424, 4 Am. St. Rep. 499.) In *Town of Clinton v. Bacon*, 56 Conn. 508, 16 Atl. 548, it was held that the uninterrupted and undisputed possession by defendant of a natural oyster bed for thirty years had not given him a title by adverse possession, the title being in the state, against which there could be no title gained by such possession. Moreover, title by prescription arises by a presumption from long-continued use of an incorporeal hereditament of a previous grant which has been lost. (3 Cruise, 467.) Therefore, nothing can be prescribed, for that can not be the subject of a grant. (*Luttrell's Case*, 4 Coke's Rep. 84b.) To the same effect, see 22 A. & E. Encycl. of L. 1187, where it is stated that the doctrine of prescription is applicable only to rights which may be granted, and that a

grant will not be presumed where it could not lawfully have been made. (*Hill v. Lord*, 48 Maine, 83 98.) In *Sollers v. Sollers*, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404, it is held that title to oyster beds belonging to the state can not be acquired by prescription.

"Property so held belongs to the people in virtue of their sovereign rights, and of it they can not be deprived save by their own appointment as expressed in the constitution. Legislatures can not imperil such property. Statutes may prescribe for its regulation, but not for its loss by the public and its acquisition by individuals by prescription or otherwise.' (Note, 75 Am. St. Rep. 488; and to the same effect, see *Burbank et al. v. Fay et al.*, 65 N. Y. 57, and *Fulton L., H. & P. Co. v. State of N. Y.*, 200 N. Y. 400, 94 N. E. 199.)" (Trans. 84.)

Conclusion.

The State submits, therefore, that full title to the bed of the river is vested in the state, that the state has the unquestionable right either to sell and from the bed of the river or to charge for the privilege of removing it.

Respectfully submitted.

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